United States Court of Appeals for the Second Circuit



APPELLEE'S BRIEF

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UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 75-7600

COLUMBIA BROADCASTING SYSTEM, INC.,

Plaintiff-Appellant,

-against-

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURS



BRIEF FOR DEFENDANTS-APPELLEES AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.

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UNITED STATES COURT OF APPEALS For the Second Circuit

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Plaintiff-Appellant,

-against-

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.

Preliminary Statement

Plaintiff-appellant CBS Inc. ("CBS") appeals from an order and opinion of the United States District Court for the Southern District of New York (Lasker, D.J.) dismissing its complaint on the merits, after an eight-week non-jury trial.

The major difficulty with CBS' <u>brief</u> on appeal is that it bears little, if any, resemblance to the <u>record</u> on appeal in this action.* Specifically:

CBS' description of its complaint bears no resemblance at all to the complaint it actually filed;

CBS' "Statement of Issues Presented" for review by the record does not fairly state those issues;

CBS' statements of purported "fact" are not the facts established by the record and found by the District Court, but rather, a rehash of CBS' proposed findings of fact below which the District Court rejected;**

CBS' references to the District Court's lengthy opinion distort that opinion -- in particular, the orderly

^{*} Another difficulty is the length and bifurcation of CBS' presentation to this Court -- 128 printed pages of "brief," and then 102 additional printed pages of so-called "addenda," which are largely devoted to repeating arguments as to the evidence which the District Court rejected and which are, in CBS' own word, "irrelevant" (e.g., CBS Br. pp. 20, 81) to the principal claim it urges on appeal, to wit, "price ficing."

^{**} We do not, of course, contest CBS' right to challenge the District Court's findings as "clearly erroneous." But we do suggest that an appellant which desires to exercise that right should, when it purports to recite the facts, at least (i) acknowledge that the District Court made contrary findings and (ii) identify those findings of the District Court which it is challenging on appeal. The section of CBS' brief entitled "Statement of Facts" does neither.

and careful manner in which Judge Lasker dealt with the massive record before him and with <u>each</u> and <u>every</u> legal and factual issue tendered by CBS; and

Finally, CBS' brief, rather than addressing the legal doctrines pertinent to the record here, offers this Court CBS' lengthy version of a primer in antitrust law.

Hence, we must put this appeal in perspective:

The District Court held eight weeks of trial and heard 30 witnesses. The trial produced a transcript of almost 5,000 pages, thousands of additional pages of documents and pretrial depositions, numerous voluminous computer runs, and extensive post-trial memoranda.

Ultimately, the trial produced a lengthy opinion by the District Court, reported at 400 F. Supp. 737-83 and reproduced at JA 2, pp. JA 584-630.* That opinion answers every argument now advanced by CBS. It is, we submit, a model of a trial court's appropriate discharge of its duties when it sits both to try the facts and to apply the law. If ever there were a case in which this Court should affirm on the opinion below, this case, we submit, is it.

^{*} References are to volumes in the joint appendix and to pages in those volumes; accordingly "JA 2" refers to Volume 2 of the joint appendix and "pp. JA 584-630" refer to those pages appearing in Volume 2.

For, as his opinion makes clear, Judge Lasker carefully considered the parties' contentions, lined up the evidence on each side, weighed that evidence, made extensive findings on the basis of the evidence, and then studied and decided the legal issues based on the findings of fact he had made.

CBS now asks this Court to engage in the following enterprises:

First, this Court, according to CBS, should ignore the trial and opinion below (because they deal with "irrelevancies") and decide this appeal on the basis of a theory of price-fixing which is sustainable only if this Court were willing to: (i) ignore the record below and the findings of fact made by the District Court based on that record; (ii) disregard the legal authorities directly in point; and (iii) accept an extraordinary theory of price-fixing spun out by CBS from cases involving such truly irrelevant matters as (a) exchange of price information by competitors and (b) the buying up of distress oil by major oil companies to stabilize the price for their own product.

Second, says CBS, if the Court is unwilling to engage in the first enterprise it should ignore the "clearly erroneous" rule and grant CBS review de novo of the massive record below.

We submit this Court should engage in neither enterprise. The findings of fact made by the District Court are clearly correct (surely, they are not "clearly erroneous"), the District Court correctly applied the law to the facts it found and, accordingly, the decision below should be affirmed.

Issues Presented

1. Are ASCAP and its members engaged in "price fixing" in violation of the Sherman Act?

The District Court answered this question in the negative, JA 2, pp. JA 595, JA 628.

2. Did CBS establish at trial that it was "compelled" to take an ASCAP blanket license and that it could
not obtain music performance licenses for the music it
desired to perform directly from ASCAP's members?

The District Court answered this question in the negative, JA 2, pp. JA 595-96, JA 628-29.

3. Are ASCAP and its members guilty of "monopolization" under the Sherman Act?

The District Court answered this question in the negative, JA 2, pp. JA 629-30.

Summary of Argument

a. "Price Fixing"

The principal legal contention urged by CBS on appeal is that ASCAP and its members are "price fixers" because of the mere fact that they ave combined through ASCAP to make available to users to so-called blanket form of license.

CBS' argument is without merit, as the District Court ruled,* for the following reasons:

ASCAP is an unincorporated membership association of publishers and creators of music which acts as a clearing-house for the licensing of performance rights to the copyrighted music of its members. Among the methods by which a user may obtain performance rights to the compositions in the ASCAP repertory is the blanket form of license available to users from ASCAP.

^{*} Judge Lasker wrote (JA 2, p. JA 595):

[&]quot;Coming after an eight week trial and the accumulation of a bulky factual record, the timing of this contention is unusual. For the reasons stated below, we find it to be unmeritorious as well."

The District Court found, and the record establishes that

(a) an ASCAP blanket license

"gives the user the right to perform all of the [copyrighted] compositions owned by [ASCAP's] members as often as the user desires for a stated term..." (JA 2, p. JA 589; emphasis added)

The prime virtue of the blanket license is convenience, for

"it provides comprehensive protection against infringement, that is, access to a large pool of music without the need for the thousands of individual licenses which otherwise would be necessary to perform the copyrighted music used on radio stations and television networks in the course of a year."

(JA 2, p. JA 589)

Finally, the blanket license

"gives the user unlimited flexibility in planning programs, because any music [the user] chooses is 'automatically' covered by the blanket license."
(JA 2, p. JA 589)

(b) Under Section IX of the Amended Final Judgment of 1950 in <u>United States</u> v. <u>ASCAP</u>, Civ. 13-95, no user, including the CBS television network, may be denied an ASCAP

license. And if the user and ASCAP are unable to negotiate the license fee to be paid, a judge of the Southern District is standing by to determine a fee in a proceeding in which ASCAP bears the burden of establishing the reasonableness of the fee it seeks (see pp. 25-31, infra).*

Lasker found, is neither "compelled" to take a license from ASCAP nor to follow the route laid out by Section IX of the Amended Final Judgment. Since ASCAP's rights from its members to license their copyrighted compositions are nonexclusive, CBS may deal directly with ASCAP's members and obtain from them, on mutually agreeable terms, licenses for the copyrighted music CBS desires to perform. This was the key finding of fact made by the District Court -- CBS could "bypass" ASCAP and deal directly with copyright proprietors who would compete on a price basis for individual compositions if CBS sought direct licenses from them. Judge Lasker also found that CBS had failed to prove that ASCAP "could effectively control the prices at which such transactions take place,"

JA 2, p. JA 630.

^{*} To date, in all cases reasonable fees have been negotiated by ASCAP and users. The District Court has never been required to determine the fee for an ASCAP license.

There is substantial evidence to support these findings (see pp. 35-67, infra).

Thus, the record establishes that ASCAP makes available to CBS (and other users) a product -- i.e., a blanket license to all compositions in its repertory giving the user maximum flexibility and convenience as to the use of those compositions -- which is totally distinct and different from the product which individual copyright proprietor members of ASCAP could offer. ASCAP may not be described as a common sales agency in which individual sellers "have agreed among themselves as to the prices to be charged for the particular 'products' (compositions) offered by each of them," JA 2, p. JA 595.

It is on the contrary, a clearinghouse, a joint licensing agency, providing a convenient service at a package price to its users -- a service that none of its individual members could offer.*

^{*} Among other benefits, which no individual member could offer: when a user obtains an ASCAP license, it obtains music performance rights for the existing compositions in the ASCAP repertory, for all compositions that may thereafter be created by every ASCAP member during the term of the license and for compositions of many additional writer and publisher members of some 30 foreign societies which are affiliated with ASCAP (JA 22, p. E 907; JA 23, p. E 1138; JA 21, p. E 491; JA 20, p. E 285).

Hence, unlike the cases and hypotheticals on which CBS relies, ASCAP members do not get together to set, fix or exchange information about the prices of performance licenses which each stands by to offer individually.* They do not, in short, "fix prices" of performance rights to musical compositions.

And ASCAP has no power to "fix" the price for the separate, convenient service which it offers; if the parties are unable to agree on a fee through negotiation, a judge of the District Court will establish the fee.

Finally, the CBS television network, as Judge Lasker found, has a viable and available alternative -- the opportunity to deal directly with ASCAP's members and to obtain from them, on a competitive price basis, the individual music performance licenses it needs. He found that CBS in the past chose a blanket license for its convenience, not by reason of "compulsion" from ASCAP's members; therefore, the mere availability of a blanket license has not, as CBS contends, eliminated "price competition."

^{*} To pick a favorite CBS hypothetical, ASCAP is not analagous to a common sales agency representing two steel companies, or all steel companies, and offering customers at a fixed price of \$1,000 a ton precisely the same product the customers could purchase from any of the companies on an individual basis (see CBS Br. pp. 35-36).

If there be some violation of the antitrust laws by virtue of the foregoing, we are not able to discern such violation and neither was the District Court.

b. The Findings on Direct Licensing

The central factual issue the trial was meant to decide is whether CBS would realistically obtain music performance rights by licensing those rights directly from ASCAP's members.* For, as Judge Lasker ruled, if CBS could realistically obtain such direct licenses, it was under no compulsion to take a blanket license from ASCAP, or to deal with ASCAP at all and, hence, there was no basis for CBS' charge that ASCAP, by making available a blanket license, has "fixed prices" by eliminating price competition among ASCAP's members.

Judge Lasker heard all the testimony on this issue, studied the documents and depositions offered by all parties and then, with meticulous, care analyzed all of CBS' arguments

^{*} Before trial, CBS' counsel did not disagree with this view of what the trial was all about. Counsel stated:

[&]quot;I think the <u>basic issue</u>, Your Honor, in a trial of this case is whether or not we are being deprived, realistically deprived of the opportunity of dealing directly with ASCAP members." (JA 1, p. JA 280; emphasis added)

as to what this evidence showed. He concluded, among other things, that

"CBS has failed to prove that there are significant mechanical obstacles to direct licensing. Nor has it established by credible evidence that copyright owners would refuse to deal directly with CBS if it called upon them to do so. To the contrary, there is impressive proof that copyright proprietors would wait at CBS' door if it announced plans to drop its blanket license. (JA 2, p. JA 626)

"... CBS has failed to prove that copyright proprietors would not compete with one another on a price basis if CBS sought direct licenses from them. (JA 2, p. JA 628)

"... CBS has failed to prove either that it purchased blanket licenses under compulsion or that the price it paid was fixed. (JA 2, p. JA 628)

"... CBS has failed to establish that the members or affiliates of ASCAP or BMI have refused or would refuse to license their compositions on a direct licensing basis, or otherwise use their collective leverage to compel CBS to license rights to music which it did not wish to license."

(JA 2, p. JA 629; emphasis added)

There is substantial evidence in the record to support each of the foregoing findings (see pp. 35-67, infra).

Although CBS, in the first instance, would have this Court ignore that evidence and, indeed, ignore this entire issue and the trial itself, it devotes endless pages of its brief and its lengthy addenda to disagreeing with the District Court's findings and conclusions and to reciting evidence which, CBS argues, points to contrary conclusions.

But dies reement with the District Court is, of course, not enough. CBS completely misperceives the role of this Court. Under the "clearly erroneous" rule, federal appellate courts review, rather than re-do, the fact-finding work of trial judges. CBS is not entitled to de novo determinations of fact by this tribunal. The findings below are not "clearly erroneous" and may not be disturbed.

c. "Monopolization"

The District Court's findings and conclusions on the subject of "monopolization" are clear, concise and supported by the evidence. We shall not repeat them here.

Statement of the Case

Introduction

This lawsuit is now more than six years old. The expenditure of time and money by the parties is self-evident as is the drain on the resources of the trial court and this Court.

Yet the District Court found that

"... CBS did not even view music licensing as a business problem until immediately prior to suit." (JA 2, p. JA 601)

and

"... CBS has exaggerated the risks involved in dropping its blanket license and sought a legal solution to what is essentially a business problem."
(JA 2, p. JA 626)

But, in seeking that "legal solution," it now seems clear that even CBS' counsel thought very little about the legal issues concerning music licensing until after this suit was commenced -- indeed, CBS' counsel seem to have thought their hardest after the case was tried and decided.

Thus, when CBS commenced this action on December 31, 1969, shortly after the Supreme Court's decision in Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969), CBS tracked and relied heavily on the language of that opinion. CBS alleged in this complaint that ASCAP and BMI violated the antitrust laws because the blanket and per-program licenses available from both licensing organizations "compel[led]" the CBS television network to pay for music it did not want and because each licensing organization was "using the leverage inherent in its copyright pool to insist that plaintiff pay

royalties on a basis which does not bear any relationship to the amount of music performed," (JA 1, pp. JA 23-24; JA 1, pp. JA 27-28).*

By way of relief, the complaint sought an injunction requiring each licensing organization to grant the CBS television network a so-called "per-use" form of license (JA 1, pp. JA 29-30).

But in the ensuing years, CBS has tendered "an imposing line-up" (JA 2, p. JA 592) of additional charges of antitrust illegality nowhere mentioned in the complaint -- e.g., tying, boycotting, price-fixing, monopolization.

As to relief, CBS at trial added a demand for what it termed "more draconian" alternative relief -- an injunction barring ASCAP and BMI from offering any form of license to any television network (even the two national television networks not parties to this lawsuit). And on appeal, the relief sought has undergone still another revision: now, CBS asserts that the principal relief sought in this action is an order "enjoining defendants from continuing to fix prices" (CBS Br. p. 4). But CBS neglects to advise the Court that

^{*} For the facts giving immediate rise to this lawsuit, see Judge Lasker's discussion, JA 2, pp. JA 600-01.

this phrasing of its demand for relief was fashioned anew for the appeal.

If drastic changes in legal theory and relief sought were not enough, now CBS repeatedly asks this Court, (e.g., CBS Br. pp. 20, 32, 81), as part of its per se price-fixing argument, to treat as "irrelevant" the very extensive record that was created below -- at CBS' behest. CBS says, in effect, that its seemingly endless pretrial discovery and the lengthy trial were a waste of time.*

And when it sought from defendants voluminous discovery, CBS argued to the trial judge:

"This is a large and complex lawsuit. It charges restraints of trade which, while blatant in their overall effects, entail proof of literally hundreds of discrete factual propositions, including numerous relatively subtle points of motivation and intent and their specific, historical manifestations." (JA 2, p. JA 312; emphasis added)

^{*} Prior to trial, CBS apparently did not view this case as involving "per se" violations. It argued to Judge Lasker:

[&]quot;This case turns on whether the ASCAP combination is eliminating competition rather than on whether such elimination of competition fits into one of the per se pigeonholes of the antitrust laws." (JA 1, p. JA 270)

We do not mean of uggest that the decision below should be affirmed merely because CBS now asserts that the issues which it tendered below and the factual propositions which it sought to prove below are irrelevant. But we do suggest that it is appropriate to note that, according to CBS, an overburdened District Court and defendants were put to enormous effort and expense, for some five years, at CBS' urging, for no good reason whatsoever.*

The fact is that we had a lengthy trial of issues of fact tendered by CBS. CBS may not now ask this Court to ignore the results of that trial.

Standards of Review

The duty of this Court with respect to a trial court's findings in a non-jury case is plain:

"Findings fact shall not be set aside unless crearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Fed R. Civ. P. 52(a)

As this Court repeatedly has held, findings of fact are not "clearly erroneous" when they are supported by substantial evidence:

^{*} As Judge Lasker noted after an eight-week trial: CBS "could have moved for summary judgment years ago" on its per se price-fixing theory, JA 2, p. JA 593.

"Where there is substantial evidence to support a finding of fact it is not within our province to set it aside."

AllState Insurance Co. v. Aetna Casualty

Surety Co., 326 F.2d 871, 374 (2d Cir. 1964).

Even a cursory comparison of Judge Lasker's opinion with the record shows that his every major finding is supported by "substantial evidence."

It is not for this Court to undertake trial <u>de</u>

<u>novo</u>, especially given the aged and subjective issues which

CBS asks this Court to explore, <u>i.e.</u>, events going back to

the 1930's (the Warner Bros. "incident") and the mid-1960's

(the 3M "incident") and defendants' intent and state of mind

(alleged "aversion" to direct licensing):

"There is no case more appropriate for adherence to [the 'clearly erroneous'] rule than one in which the complaining party creates a vast record of cumulative evidence as to long-past transactions, motive, and purposes, the effect of which depends largely on credibility of witnesses." United States v. Oregon State Medical Society, 343 U.S. 326, 332 (1952)

Accordingly, our discussion of the facts shall follow closely the findings of the trial court and shall identify the "substantial evidence" which supports those findings. It is fully apparent, we submit, that those findings are not "clearly erroneous" -- instead, they are wholly warranted.

STATEMENT OF FACTS

A. The Parties

1. CBS - The Alleged Victim

CBS, which has steadfastly asserted throughout this litigation its impotence to engage in meaningful direct licensing transactions with ASCAP's members, is probably the single most important economic entity in the entertainment industry generally, and in the music business in particular, in America.

Every ASCAP member appreciates the consequences of displeasing CBS. As Judge Lasker found (JA 2, p. JA 618):

"On CBS' own theory that composers and publishers belong to the race of economic men, it is doubtful that any copyright owner would refuse the opportunity to have his music performed on CBS, much less wish to incur CBS' displeasure."

CBS is one of three national commercial television networks. It owns and operates local television stations in five principal markets -- New York, Los Angeles, Philadephia, Chicago and St. Louis. It transmits for broadcast approximately 7,500 television programs a year to its five owned

and operated stations and to approximately 190 affiliated stations throughout the country. (JA 2, p. JA 589; JA 20, pp. E 2-3; JA 20, pp. E 7-8; JA 20, p. E 9; PX 540-49)*

The District Court, commenting on CBS' economic power as one of three television networks, wrote (JA 2, p. JA 617):

"The two most salient features of the television music market are the enormous value to copyright proprietors of network exposure and the markedly limited opportunities for securing it.

"The eagerness, and occasional desperation, of copyright proprietors is heightened by the fact that there are so few opportunities to win the prize. There are only three television networks...."

And, as is well known, among the three television networks, for some twenty years CBS has been the leader.

(JA 12, pp. 3374, 3421; JA 16, pp. 4615-16) It is "the world's largest advertising medium" (JA 16, p. 4616); it broadcasts to the world's largest audience (JA 12, p. 3374; JA 16, p. 4616); it was fully justified in proclaiming on the air at the time of trial that it was the number one television network.

^{* &}quot;PX 540-49" refers to plaintiff's exhibits which are part of the Record on Appeal. These exhibits were designated for inclusion in the joint appendix but were inadvertently omitted.

In radio, CBS owns and operates seven AM and FM stations in major cities (JA 2, p. JA 589), and its network has affiliation agreements with approximately 250 local radio stations (JA 20, p. E 7).

CBS also is a significant presence in the music business directly. CBS Records is "the largest manufacturer and seller of records and tapes in the world." (JA 2, p. JA 618)

CBS also owns two large music publishing companies -April Music, Inc., an ASCAP member, and Blackwood Music, Inc.,
a BMI affiliate (JA 2, p. JA 618). These music publishing
companies publish some of the background and theme music
written for CBS television programs; they publish compositions
recorded by CBS Records; they maintain and exploit catalogs
of compositions of writers under contract; and they collect
performance royalties from ASCAP and BMI.

The foregoing facts, and others, led the District Court to conclude that CBS has "enormous power within the music industry"; it is the "No. 1 outlet in the history of of entertainment" and "the giant of the world in the use of music rights," JA 2, p. JA 618 (see also, JA 12, p. 3374).

In short, CBS is no tyro when it comes to dealing with people in the entertainment industry. CBS constantly

deals with the producers of television programs, the major creators and performers of music, the publishers of that music, their lawyers, agents, accountants, etc.

CBS knows who those people are, and it has extensive experience in negotiating with them. And CBS brings to those n gotiations vast business and legal talent, backed by immense economic power.*

These are the facts of record concerning CBS -the alleged victim of an ASCAP "price fix" and the ASCAP
"monopoly."

2. ASCAP - The Alleged Perpetrator

ASCAP is a music performance rights licensing society. It is an unincorporated association whose

^{*} In the District Court, it is our counterclaim that CBS' market power is too great to be lawful and that the necessary remedy is dissolution. CBS, after all, is a common buying agent for approximately 200 television stations, procuring programs to be broadcast by them. It is, moreover, a common selling agent of the advertising time and broadcasting facilities of these same stations.

And so we say that CBS, in dealing with individual creators of music, would have them at a great and unlawful economic disadvantage. The District Court has stayed consideration of these claims for a later time, so we shall not here dwell upon them further except to note that, if CBS is to claim that ASCAP and its members are "price fixers" and "monopolists," what shall we call CBS -- just one of the three major television networks?

membership consists of some 6,000 music publishing companies and 16,000 writers, composers and lyric authors.

It was formed in 1914 for reasons described by Judge Lasker as follows (JA 2, pp. JA 588-89):

"Prior to ASCAP's formation in 1914 there was no effective method by which composers and publishers of music could secure payment for the performance for profit of their copyrighted works. The users of music, such as theaters, dance halls and bars, were so numerous and widespread, and each performance so fleeting an occurrence, that no individual copyright owner could negotiate licenses with users of his music, or detect unauthorized uses. On the other side of the coin, those who wished to perform compositions without infringing the copyright were, as a practical matter, unable to obtain licenses from the owners of the works they wished to perform. ASCAP was organized as a 'clearing-house' for copyright owners and users to solve these problems. The world of music has changed radically since 1914. Radio and television broadcasters are the largest users of music today; they 'perform' copyrighted music before audiences of millions. In 1975 ASCAP and BMI licensed these large users, including CBS and the other networks as well as smaller ones such as concert halls and background music services."

ASCAP's members grant to the Society "the nonexclusive right to license users to perform the compositions owned by them," JA 2, p. JA 589.* And the Society in turn provides a range of services including maintaining a "surveillance system of radio and television broadcasts to detect unlicensed uses, institut[ing] infringement actions, collect[ing] revenues from licensees and distribut[ing] royalties to copyright owners in accordance with a schedule which reflects the nature and amount of the use of their music and other factors," JA 2, p. JA 589.

ASCAP is managed by a Board of Directors composed of 12 writer and 12 publisher members. The writer members of the Board are elected solely by the writers; the publisher members solely by the publishers. (JA 9, pp. 2411-12)

All ASCAP receipts are distributed to the members after deducting only the costs of operating the Society.

^{*} The musical copyright covers a bundle of other discrete rights defined in the Copyright Act of 1909 and subdivided in commercial practice. ASCAP deals only with performing rights. There is a separate right to print, publish and sell sheet music. Next, there is a "recording" or "mechanical" right to reproduce a composition by phonograph or other "mechanical" recording. The mechanical right is to be distinguished, in turn, from the "synchronization" right — the right to make a soundtrack in "synchronization" with the action portrayed in a film or video tape.

3. BMI - Another Alleged Perpetrator

The District Court found that BMI is a corporation organized in 1939 by the radio broadcasting industry, including CBS. Although CBS sold back its BMI stock to the corporation in 1959, BMI is still owned entirely by broadcasters. BMI is affiliated with approximately 10,000 publishing companies and 20,000 writers. (JA 2, p. JA 589)

B. The Present System of Licensing Performance Rights -- The Amended Final Judgment

On the issue of whether ASCAP fixes prices, boycotts, monopolizes, or engages in some other species of
antitrust violation, it is pertinent to point out that, while
CBS' economic power is unfettered, virtually every aspect of
ASCAP's operations and licensing authority is governed by the
provisions of the Amended Final Judgment entered on March 14,
1950 in <u>United States</u> v. <u>ASCAP</u>, Civ. No. 13-95, as amended
by an order of January 7, 1960. (JA 20, p. E 124; JA 20,
p. E 139) The most significant terms of that judgment are
set forth in the District Court's opinion and need not be
repeated here. (JA 2, pp. JA 590-91)

In brief summary, however, under these provisions, and under the ASCAP Articles of Association and the forms of agreement executed by each member:

- (a) membership in ASCAP is open to <u>any</u> writer or publisher who meets certain minimal standards hence no copyright proprietor may be denied the right of access to the markets where songs are licensed;
- (b) each member grants to ASCAP only the nonexclusive right to license non-dramatic public performances for profit of his compositions, including those created during the member's term of membership in ASCAP;
- (c) ASCAP is forbidden from interfering with the member's right to license directly;
- (d) ASCAP is expressly forbidden to license individual compositions, unless the member-in-interest and the would-be user request ASCAP to issue such a license;
- (e) no user may be denied an ASCAP license -indeed, a user obtains an ASCAP license by the very act of applying for one;
- (f) no member of ASCAP may be compelled to stay in the Society.

These provisions guarantee that the public may
hear music in the ASCAP repertory as long as broadcasters or
artists wish to perform that music. ASCAP has no power
to boycott any user, nor to prevent any user from performing
the music in its repertory. ASCAP's members, in practical effect,
have consented to a compulsory performance license.

These provisions also make it plain that ASCAP is not a common sales agent which sets a price for the particular compositions of each of its members. Indeed, ASCAP is enjoined (except under limited circumstances) from selling what individual members may sell directly -- i.e., licenses for individual works. (JA 20, pp. E 130-31; JA 13, pp. 3593-94) ASCAP is, rather, a joint licensing society, which is directed to offer only a convenient service: a license for the rights to all the compositions in its repertory.

1. The Forms of License

Under the Amended Final Judgment, ASCAP is required to grant to broadcasters the "per program" form of license.

Under that form of license, the broadcaster obtains, as he does under a blanket license, "the right to use any or all of the works in ASCAP's repertory," JA 2, p. JA 590; but he pays ASCAP a fee only for those programs which use ASCAP music.

No fee is paid on account of any program that does not use ASCAP music.

Of course, ASCAP also offers a "blanket" license.

But under the Amended Final Judgment, ASCAP is "enjoined and restrained" from issuing a blanket license unless the broadcaster desires that form. (JA 20, p. E 131)

The blanket license is a license under which the user has the right to perform as often as the user desires any or all of the copyrighted compositions owned by every ASCAP member at the date of the license -- or created by each member during the term of the license. The user pays either a flat fee or a percentage of its revenues as a license fee.

"Convenience," as the District Court noted, "is the prime virtue of the blanket license," JA 2, p. JA 589.

And so, the blanket form of license which CBS purports in this lawsuit to find so offensive is in fact the form of license held by virtually all radio and television stations and networks.

2. <u>License Fees</u>

Since this is a lawsuit in which ASCAP is being accused of "fixing prices," it is important to advise the

Court that the fees that ASCAP may charge for its licenses are regulated in some detail by the Amended Final Judgment. If a user is dissatisfied with a fee quoted to him by ASCAP, he has an absolute right to apply, under Section IX of the Amended Final Judgment, to the United States District Court for the Southern District of New York, for the determination of a "reasonable fee." In any such proceeding, ASCAP -- not the user -- bears the burden of proof of establishing the reasonableness of the fee it requests.* (JA 2, p. JA 591; JA 20, p. E 132)

In the past, there have been numerous such proceedings under the Amended Final Judgment, including some initiated by CBS, some instituted by the other telvision networks, and some instituted by industry-wide committees representing local television and radio stations. During the course of these proceedings, the petitioners and ASCAP have negotiated -- sometimes for extended periods of time -- the terms of a new license, including the fee. In each case, to date, the proceedings have been concluded by agreement of the parties as to what constitutes a reasonable fee. (JA 2, p. JA 592; JA 13, p. 3870; JA 14, p. 3942)

^{*} In the event of such a proceeding, Section IX also contains elaborate provisions for the setting of interim fees which remain in effect while the proceeding is ongoing and are subject to retroactive adjustment once the proceeding is concluded. (JA 20, pp. E 132-33)

3. Distributions of ASCAP's Revenues

ASCAP's distributions to its members are governed by orders of the District Court supplementing the Amended Final Judgment. Advisers appointed by the District Court oversee the operation of ASCAP's music performance survey system. The actual distribution system is rather complex, but its objective, in brief summary, is to comply with the command of the Amended Final Judgment that ASCAP

"distribute to its members the monies received . . . on a basis which gives primary consideration to the performance of the compositions of the members as indicated by objective surveys of performances (excluding those licensed by the member directly) periodically made by or for ASCAP." (JA 20, pp. E 133-34; JA 20, pp. E 141-48)

To sum up: the present system for licensing performance rights

guarantees that the public will be able to hear ASCAP music;

guarantees that each user will be able to give performances of ASCAP music;

guarantees that the user will be free from discrimination and is entitled to judicial determination of the reasonableness of the fees he shall pay;

guarantees the rights of users to deal directly with copyright proprietors;

guarantees to the creators of music the opportunity to be rewarded in accordance with the popularity of their works.

As Judge Lasker found, CBS does not contend that ASCAP has violated the terms of the Amended Final Judgment. (JA 2, p. JA 592)

C. Prior Relationship of the Parties

CBS does contend, however, that the foregoing system of licensing music performance rights constitutes a per se violation of the antitrust laws. So it is pertinent that CBS, from its corporate beginnings as a broadcaster in 1929, has been an active participant in the system which it now claims to be illegal.

Judge Lasker found (JA 2, p. JA 600):

"Until the institution of the present suit CBS appears to have lived quite happily with the blanket arrangement which it now disavows. Since 1929 it has btained ASCAP blanket licenses for its various broadcast operations, the earliest one purchased on behalf of a radio station; ... Since its establishment in 1946, the CBS television network (CTN) has continuously held blanket licenses from ASCAP and BMI. Since 1950, CBS' negotiations with ASCAP for licenses for its television network have of course been conducted within the framework of the amended consent decree. Although, as noted earlier, the terms of the 1950 decree prohibit ASCAP from negotiating a blanket license prior to determining whether the user would prefer a paregram license, CBS has never applied for relief under the decree complaining that ASCAP insisted on blanket licenses. Nor has the court ever been required to set a 'reasonable fee' for the blanket licenses negotiated by the parties from time to time. CBS has never negotiated or held a per-program license from ASCAP or BMI for its television network and has never attempted to fulfill its music requirements by bypassing either organization and securing performance rights directly from copyright owners."

And (JA 2, p. JA 600):

... when CBS and other broadcasters established BMI in 1939, they agreed to take blanket licenses."

Such, then, were the "Amicable Marriage[s]" (JA 2, p. JA 600) between both (i) CBS and ASCAP and (ii) CBS and BMI (a creature of the broadcasters, including CBS) that

preceded this litigation.* The events of 1969 leading to the "break up" of the marriages are fully described in the opinion below (JA 2, pp. JA 600-01) and need not be repeated here. Significantly, however, this lawsuit did not follow a breakdown of negotiations for a new form of license, but rather a breakdown over the money terms for renewal of CBS' blanket license, JA 2, p. JA 600.

D. Development of the Issues for Trial

In 1971, ASCAP moved for summary judgment, on the authority of K-91, Inc. v. Gershwin Publishing Corp.,

372 F.2d 1 (9th Cir. 1967), cert. denied, 389 U.S. 1045 (1968), arguing, in essence, that even assuming the existence of some physical barriers to direct licensing, no violation of the antitrust laws was stated.

At that stage of the case, having only papers before it, the District Court wondered whether CBS' right to license directly -- which was cited by ASCAP as a major reason for granting summary judgment -- is "more apparent than real,"

337 F. Supp. at 401. The court also distinguished K-91

^{*} It was, as the trial judge found, a marriage sought by CBS, not the result of any compulsion from ASCAP or its members: "since the advent of television, [CBS] found it convenient to secure a blanket license which, by definition, can be practicably obtained only through a collective licensing agent." This "state of affairs has resulted not from any violation of the antitrust laws" JA 2, p. JA 630.

on the ground that in this case, unlike <u>K-91</u>, CBS had proposed what it claimed was a "less restrictive alternative" to blanket licensing -- <u>i.e.</u>, the "per-use" proposal, 337 F. Supp. at 400-401. And so the court denied summary judgment.*

Subsequently, the District Court entered an order identifying the issues for trial and making it clear that nothing in its summary judgment opinion was intended to relieve CBS of its obligation to prove, in the first instance, an actionable restraint. The issues identified for trial were (JA 2, p. JA 594):

- "(i) Whether defendants' conduct constitutes an actionable restraint of trade and compels the plaintiff as alleged in the complaint;
- "(ii) Whether, if such restraint or compulsion exists, it is reasonable and justified or whether it may be achieved by less anti-competitive means."

Since Judge Lasker found after hearing all of the evidence that there was no "restraint or compulsion," he never had to reach the second issue.

^{*} As Judge Lasker noted after trial, he was never in disagreement with the holding of the K-91 court that the activities of ASCAP were not illegal per se. (JA 2, p. JA 593)

E. The Trial - the Feasibility of Direct Licensing

As we noted earlier, the principal issue at trial was whether CBS could obtain music performance licenses directly from ASCAP's members and thus realistically avoid having to deal with ASCAP at all. If CBS could thus "bypass" ASCAP by entering into direct licenses with ASCAP's members, then clearly CBS was not "compelled" to take a blanket license from ASCAP as alleged in the complaint. And if CBS were not "compelled," CBS had failed on the first issue of the trial -- CBS had failed to prove that ASCAP, by offering a convenient service, has thereby eliminated price competition or otherwise restrained trade in violation of the antitrust laws.

As Judge Lasker noted (JA 2, p. JA 598):

"... to prevail here CBS must prove that defendants' conduct in combining into ASCAP and BMI compels CBS to take a blanket license as alleged in the complaint. Proof that direct licensing is not a feasible alternative to the blanket license is an essential element of CBS' claim, on which it accordingly bears the burden of proof. Conversely, proof that CBS could obtain the necessary performance licenses directly from copyright proprietors would be fatal to its claim that they have pooled the rights to perform their music in a manner which illegally restrains trade in those rights." (Emphasis in original)

CBS, fully recognizing the significance of the so-called "bypass" issue, <u>i.e.</u>, the feasibility of direct licensing, devoted the vast bulk of its direct case at trial to offering proof of the alleged non-feasibility of direct licensing, <u>i.e.</u>, proof of a host of barriers to obtaining direct licenses from ASCAP members which CBS alleged it could not overcome.

The trial court found against CBS on this issue -it found that CBS had failed to prove that the alleged
barriers or obstacles existed and it made an affirmative
finding that CBS could realistically obtain music performance
rights directly from ASCAP's members. So CBS begins its
brief by arguing that the feasibility of direct licensing
is "irrelevant." But then it devotes some 45 pages of its
brief (pp. 65-110) and its lengthy addenda (102 pages) to
argue that the trial court's findings on this issue were
wrong.

CBS's arguments are without merit on every score. First, as Judge Lasker held, the feasibility of direct licensing is directly relevant to the legal issues in this case; his findings on that factual issue may not be treated as "irrelevant."

Second, the court's findings were not "clearly erroneous"; on the contrary they were clearly correct.

We shall now discuss those findings and the substantial evidence supporting them.

1. Quality of the Proof

To begin: as the trial court noted, CBS' proof on the issue of the feasibility of direct licensing was largely "hypothetical" and abstract, because CBS had never asked ASCAP's members to engage in direct licensing nor had it ever asked them to establish any "machinery" for direct licensing.* (JA 2, p. JA 599)

^{*} CBS' brief tries to make it appear as if the District Court found "fault" with CBS for failing to make such prior demand and that it rejected CBS' claims as a matter of law for that failure. (CBS Br. pp. 67-68, 91)

Again, CBS' brief seriously misrepresents the opinion. In fact, the court found no "fault" and, indeed, expressly rejected defendants' contention that prior demand by CBS was a prerequisite to suit. But the court did note that CBS' failure ever seriously to consider -- much less try -- direct licensing inevitably affected the quality of its proof:

[&]quot;Although we agree with CBS that it is not required as a condition to suit to have been unequivocally refused the kind of license[s] it now seeks, defendants' argument highlights the unusual nature of CBS' claim and the kind of evidence on which it relies." JA 2, p. JA 599.

The quality of CBS' proof was rendered even more abstract, however, by the fact that it was developed through what the District Court called "generous use of hypothetical questions," put to CBS witnesses unfamiliar with the music business, who ignored CBS' actual programming and music use, and who made the unrealistic assumption of a CBS changeover from an ASCAP blanket license to direct licensing on twenty-four hours' notice.* (JA 2, pp. JA 605, JA 610, JA 627)

2. CBS' Programming and Music Use

Next, as the trial court noted (JA 2, p. JA 602), to evaluate properly CBS' claims concerning the asserted barriers to direct licensing, it is necessary to understand what CBS' witnesses tried to ignore -- the actual nature and extent of CBS' programming and use of music. There was extensive evidence concerning that subject -- largely undisputed.

First, as Judge Lasker found (JA 2, p. JA 602):

"... CBS itself produces virtually none of its 'entertainment' programming. Apart from the news, public affairs, sports and special events programs -- which CBS does produce and which make little use of music -- the bulk of the programs broadcast over the network are acquired from independent program production companies, or 'packagers.'"

^{*} When CBS' counsel put one of these typical hypotheticals to Michael Dann, a former Senior Vice President of CBS, who was called as an ASCAP witness, Mr. Dann found the question utterly unrealistic and responded, "I wouldn't cancel a trucking contract over twenty-four hours." (JA 12, p. 3432)

The CBS network schedule today may be divided. into three types of programs:

- (a) taped and filmed dramatic and comedy series and occasional motion pictures (e.g., The Mary Tyler Moore Show, Cannon, the daytime soap operas, and Thursday Night at the Movies);
- (b) regular comedy-variety programs (e.g., The Carol Burnett Show) and occasional variety specials; and
- (c) news, public affairs, sports, special events, and miscellaneous.

The vast preponderance of CBS' programming falls into category (a). Perhaps as much as 90% of the programming consists of taped and filmed series and motion pictures: for example, of the 22 "prime time" hours in a week of programming, only two or three are regularly devoted to variety shows.

(JA 2, pp. JA 602-603, JA 605 n. 11; JA 12, pp. 3222-24, 3238-39; PX 540-41)*

As to use of music, the programs in category (a) use mainly "theme" and "background" music. "'Theme music',"

^{*} See note page 20, supra.

the District Court noted, "is the music used to introduce and close a program. 'Background music' is used to complement action on the screen," JA 2, p. JA 602.

Theme and background music is created specially for a television program. After the program is filmed or taped, the packager of a program -- which may be a Hollywood studio such as Universal or a production company owned by the star of the show (e.g., the MTM Company which owns and produces the Mary Tyler Moore Show) -- hires a composer. The composer views the film to decide which action requires musical background; he scores the music and arranges and conducts the score. The producer pays the writer a fee for this work and acquires the copyright from him as "an employee for hire." Theme music is created the same way.

(JA 2, pp. JA 602-603)

The outside producers of most of CBS' regular programs own publishing subsidiaries which acquire the copyrights for the theme and background music which has been composed for the program. For example, Universal owns publishing houses such as Leeds Music, which in turn owns the right to music created for Universal's television programs. The publishing subsidiaries then receive royalty

on the shows produced by their parent company. The District Court noted that the royalties so received are a "small fraction" of the amount which the producer receives from CBS for the program itself. CBS may pay upwards of \$200,000 for an hour-long sisode of a dramatic series; but the publisher's performance royalties for that program may amount to about \$1,500 and the writer, who shares equally with the publisher in performance royalties from ASCAP, will receive the same amount. (JA 2, p. JA 603)

CBS' two or three variety shows use specially created theme and background music; in addition, they use "feature" music, "music used as the main focus of audience attention; for example, a performer singing a song on a variety shows," JA 2, pp. JA 602-603.

Feature music, in contrast to theme and background is music which ordinarily -- but, by no means always -- has been composed and published prior to its use on a CBS program. Feature music typically -- but again, by no means always -- is controlled by an "outside" publisher -- one not connected with the program production company. (JA 2, p. JA 603; JA 4, pp. 421-22, 489-90)

Although, as the District Court said, there was disagreement among the parties as to the precise percentages of feature music used on CES' programs, the undeniable fact is that the programs which make heavy use of feature music (variety-comedy programs) constitute only a small proportion of CBS' schedule. This Court is perhaps aware that this season there were only three such programs on CBS during its regular prime time program schedule.* (JA 2, p. JA 605 n. 11; JA 3, p. 325; JA 4, pp. 489-90, 495; JA 3, pp. 322-24; JA 12, pp. 3238-39; AX 286-87, AX 160, PX 540-41**)

^{*} CBS plays a numbers game and misleads this Court with its references to the ASCAP "credits" earned by feature performances on the CBS television network. (E.g., CBS Br. Add. A at 13-14) Under the ASCAP distribution system, a feature performance earns substantially more credits for the member in interest than a performance of theme or background music. And so an aggregation of "credits" earned by feature performances, while it reflects the economic value of the performances to ASCAP's members, says little about the actual number of uses by CBS of feature music compared to its actual uses of theme and background music.

^{**} See note page 20, supra. "AX 286-87" and "AX 160" refer to ASCAP exhibits which are part of the Record on Appeal. These exhibits are computer studies of CBS television music use. Because of the bulk of the rintouts, they were not reproduced in the joint appendix.

These are the fundamental aspects of CBS' programming and use of music today, as found by the District Court and supported by substantial evidence in the record. We now proceed to discuss the alleged "obstacles" cited by CBS which would prevent CBS from licensing directly its need for theme, background and feature music, given the foregoing facts concerning its <u>actual</u> use of those categories of music today.

3. An Alleged Obstacle - Lack of Machinery

CBS' witnesses claimed that there was a lack of the "transactional machinery" necessary for direct licensing transactions between CBS and copyright proprietors.

To be sure, as CBS repeatedly emphasizes, it was stipulated before trial that ASCAP's members heretofore "have not established facilities or procedures" (JA 20, p. E 6) for processing requests by music users for direct licenses for performance rights. But, as Judge Lasker pointed out (JA 2, p. JA 604, JA 606):

"... by taking a blanket license for twenty years, CBS (as well as other broadcasters) has 'preempted' any need for the machinery whose absence is now claimed to constitute an antitrust violation. We are unable to accept the proposition that defendants have had the obligation to create the framework for a

direct licensing system, particulary in the absence of any indication that CBS would ever wish to use it. There is no evidence, and indeed CBS does not claim, that defendants have refrained from creating the necessary machinery for the purpose of injuring CBS. In these circumstances, the fact that defendants have so far done nothing to facilitate direct licensing does not support the conclusion that they are illegally restraining it.

"... nothing in the antitrust laws requires defendants to maintain well-oiled machinery for direct licensing for the benefit of CBS."

And so the issue which the trial court had to decide by virtue of the nature and quality of CPS' claims and proof was the likelihood that machinery for direct licensing could be established within a reasonable time once CBS announced its intention to proceed with direct licensing.

The trial court found that the testimony of CBS' principal witnesses on this issue "was not persuasive and their views on machinery were vague and abstract,"

JA 2, p. JA 605.

Its findings are supported by substantial evidence:

As to the series programs which are the <u>bulk</u> of CBS' programming, and which use theme and background music almost exclusively, there clearly is no "machinery" barrier of any sort. Indeed, as Judge Lasker found, the very "description of the process by which theme and background music is created makes clear that CBS can easily acquire performance rights [to such music] as part of the same transaction by which it acquires the program itself,"

JA 2, p. JA 603.* (JA 3, p. 19; JA 4, pp. 489-90, 493-95, 664-66; JA 5, pp. 700-01, 722-26; JA 10, pp. 2859-60, 2867; JA 12, pp. 3447-51)

As to the feature music used on the few CBS variety programs (and occasionally on filmed or taped series) the District Court found CBS' contentions as to machinery "without merit"; they "dissolve in view of the evidence as to the licensing of other rights in music," JA 2, pp. JA 606, JA 607.

First, although CBS claims there would be difficulty finding copyright proprietors, the evidence showed,

^{*} Judge Lasker wrote (JA 2, p. JA 602):

[&]quot;CBS concedes that it would be a simple matter for it to obtain direct licenses for most of the theme and background music it uses"

and Judge Lasker found, that producers of CBS programs today easily locate the copyright proprietors of all the music used on CBS variety shows: CBS variety show producers regularly locate and deal with copyright proprietors to acquire synchronization licenses (as well as consents to lyric changes and special comedy uses). (JA 2, pp. JA 607-608; JA 4, pp. 478-79, 525-27, 602-04; JA 5, p. 798; JA 19, pp. D 779-80, D 831)

CBS' own witnesses testified that problems in acquiring synchronization licenses are "rare" and that the facilities now used to obtain such licenses could be used to give CBS' producers the name and address "of any copyright owner," JA 2, p. JA 607. (JA 4, pp. 424-25, 478-79, 525-28, JA 5, pp. 686-87, 789-90, 798, 924, 973-74; JA 19, pp. D 779-80, D 831)

Second, although CBS claims that obtaining the consents of writers to direct licenses would pose a substantial "machinery" problem to direct licensing of feature uses, Judge Lasker found to the contrary, with ample support in the record. Publisher witnesses testified that writer consents today are regularly obtained for many television uses. Despite an "occasional difficulty," when a writer is

on vacation, for example, the witnesses said that writer consents "rarely caus[e] delay," JA 2, p. JA 608* (JA 4, p. 527; JA 11, pp. 2960-62, 2968-70, 3059-60; JA 21, p. E 439; JA 21, p. E 486; Morris EBT 115-16).** Moreover, writers are "intensely eager to have their work performed on television," JA 2, p. JA 608; JA 5, pp. 926-27, 973; JA 11, pp. 2957, 3083-86; JA 12, pp. 3278-80, 3372-74, 3457-60, 3485-86; JA 17, pp. D 139-40, D 188-89; JA 19, pp. D 709-10, and thus many writers have given their blanket consents in advance.

In light of this eagerness, Judge Lasker found "[t]here is every reason to believe that most writers would either give their publishers blanket consents for performance licenses, or give it promptly on a use-by-use basis, just as they presently do regarding synch licenses," JA 2, p. JA 608. (See also JA 11, pp. 2960-63, 2968-70; JA 21, p. E 439; JA 21, p. E 486)

^{*} CBS challenge to this finding is a quotation from the deposition of Leon Brettler which CBS claims shows that "[t]here is always a problem in finding these people." (CBS Br. p. 77, fn.) Like nearly all CBS excerpts of deposition or trial testimony this one too is excised out of context. In fact, Mr. Brettler testified that when a writer is in New York, Mr. Brettler is able to obtain consent the same day; when the writer is out of New York, Mr. Brettler experiences a delay of only a few days. (JA 17, p. D 141)

^{**} These pages of the deposition of Edwin H. Morris are part of the Record on Appeal. They were designated for inclusion in the joint appendix but were inadvertently omitted.

Third, the proof established "beyond doubt" that the "relatively modest" machinery for CBS to license directly could be developed "during a reasonable planning period" -- if only CBS asked (JA 2, pp. JA 611-12). To be sure, CBS' brief, like its post-trial submissions, "strain[s] to give the impression" that direct licensing would entail a "large number of complex tasks requiring a massive staff," JA 2, p. JA 610.*

But the evidence, reviewed in extensive detail in the opinion below demonstrated to the contrary (JA 2, pp. JA 609-611).

Perhaps the best answer to all the machinery problems posed by CBS' witnesses was one they supplied themselves: CBS' witnesses said that the requisite machinery for direct licensing would "spring up" in a short time under either of the two forms of relief

^{*} Here, again, CBS misleads this Court. It continues to speak in its brief as if its entire network schedule were composed of comedy-variety type programming making extensive use of feature music owned by "outside" publishers. The facts are to the contrary (see pp. 38-43, supra).

demanded by CBS below.* (JA 2, p. JA 611; JA 3, pp. 75, 79-80; JA 4, pp. 437-39, 555-56; JA 5, pp. 695-99; JA 8, pp. 1654-55, 1659-61; JA 19, pp. D 861-62)

The District Court summarized its findings on "machinery" as follows (JA 2, p. JA 612):

"Because CBS does not claim that it would commence direct licensing tomorrow (although its counsel often questioned witnesses on the assumption that it would), the relevant question is whether the relatively modest machinery required [to enable CBS to engage in direct licensing] could be developed during a reasonable planning period. The evidence establishes beyond doubt that it could."

There is no basis whatever for disturbing these findings.

^{*} CBS argues that creation of the requisite machinery would require great expenditures of time and money by ASCAP's members. Hence, says CBS, ASCAP's members would drive CBS back to ASCAP by merely "forebearing" from making those expenditures. We deal with this claim at pp. 86-88, infra. Suffice to note here that this is a perfect example of CBS' efforts to obtain de novo determinations of fact from this Court; for the trial court, after hearing all of the evidence on this subject -- pro and con -- found against CBS. (JA 2, pp. JA 604-12)

4. An Alleged Obstacle - Disinclination

CBS' witnesses contended that the "disinclination" of ASCAP's members to give up the "safe haven" of ASCAP would be an obstacle to direct licensing. At times, the "disinclination" argument was a prediction of mass refusals to deal with CBS, and at other times it took the form of an argument that ASCAP members would refrain from creating the requisite machinery, put CBS at a "competitive disadvantage," and thus compel CBS to come back to an ASCAP blanket license. Only the latter version appears in CBS' present brief.*

Moreover, prior to trial, CBS sought, and obtained an onerous number of depositions by arguing that it needed those depositions in order

^{*} Indeed, CBS misleads this Court (e.g., CBS Br. p. 80, fn, 81, Addendum A, p. 21, fn) by denying that CBS ever claimed that a "bypass" would trigger a concerted refusal to deal. In fact, its witnesses repeatedly predicted such outright refusals to deal: see, e.g., Sipes: "if I wanted to go for music performance rights at that time, the reason I couldn't get them is that the man would not make a deal with me" (JA 3, p. 202); Wright: "He probably would be quite hostile to me. I would think he would not want to do business with me..." (JA 4, p. 465); Fisher: "... given the time pressure on CTN, and ... given the reluctance of publishers and writers to deal outside of ASCAP, the publishers, the writers won't have to deal outside of ASCAP..." (JA 8, p. 1690); Dean [CBS' employee]: "We would be unlikely to deal with those television producers [seeking to negotiate directly]" (JA 8, pp. 1815-16).

[&]quot;to establish that the ASCAP membership would greet any such CBS [bypass] attempt with a refusal to deal so reflexive and staunch as to make any such effort totally unrealistic. In its proof of that proposition -- in effect, the ingrained attitudes

The trial court found that CBS utterly failed to prove either form of this "disinclination" contention. On the contrary there was "impressive proof," the trial court said, that copyright proprietors "would wait at CBS' door if it announced plans to drop its blanket license," JA 2, p. JA 626.

Once again, the trial court found the testimony of CBS' witnesses on this issue "unimpressive" (JA 2, pp. JA 612-13): none had ever so much as spoken to a copyright proprietor; none took account of the fact that television network exposure of music is "eagerly sought" by copyright proprietors; none took account of the fact that there are so few opportunities for that prize; and none took account of "CBS' enormous power" in the music business. All of CBS' witnesses on this issue talked as if the CBS television network would come to negotiate with an individual copyright proprietor with hat in hand. (JA 3, pp. 155, 183, 201, 204, 210-11; JA 4, pp. 358, 463-67, 542, 549, 633-35; JA 5, pp. 695-99; JA 8, p. 1685; JA 16, pp. 4853-54)

fn cont'd

of at least some significant number of 19,000 suppliers -- a plaintiff should not be forced to rely on one or two depositions, but, obviously, permitted to conduct precisely the sort of deposition program which we are attempting to pursue."
(JA 2, p. JA 341; emphasis added)

Although CBS now asserts on appeal (CBS Br. p. 79) that no responsible CBS executive would give "10 minutes" thought to direct licensing in light of the risks it would pose, the fact is that the one disinterested network executive who testified -- Michael Dann* -- said the alleged risks in direct licensing are nonexistent. (JA 12, pp. 3274-90, 3373-74) The trial judge, after weeks of testimony from both sides, found that CBS had not discovered solutions to the problems it purported to see in direct licensing for the simple reason that no responsible executive in fact ever gave the question even 10 minutes of thought. (JA 2, pp. JA 626-27)

Briefly to summarize the proofs and findings on "disinclination":

The District Court expressly took account of the fact -- rehearsed at length in CBS' papers below and on appeal -- that ASCAP members have expressed a strong preference for licensing their music through ASCAP, and some even expressed an aversion to having to deal directly with the CBS monolith. The court also expressly considered what CBS

^{*} Mr. Dann, until his retirement from CBS in 1970, for over twenty years was the CBS executive in charge of television network programming, and was called as a witness by ASCAP.

claims to be the very strong "incentives" against licensing directly. (JA 2, pp. JA 613-18)

The District Court considered all that, and it considered as well such testimony of CBS' witnesses as bore on the disinclination issue. The District Court, performing its function as trier of the facts, rejected CBS' speculations as to "disinclination." The trial court was persuaded, instead, by some basic facts about the industry (which CBS ignored at trial and continues to ignore on appeal) and by the testimony of numerous ASCAP members, and other witnesses, that music publishers and writers would deal directly with CBS.*

As to the basic facts about the industry, the District Court found that the "incentives," on balance, simply cut against CBS' position. CBS has "enormous power" in the music industry, and thus every copyright proprietor has a very strong "incentive" to do everything he possibly can to please CBS and not to run the risk of incurring its

^{*} CBS criticizes the District Court for relying on the "self-serving" testimony of ASCAP's members, and for rejecting the "self-serving" testimony of CBS' witnesses. But, at a trial, where much of the evidence is "self-serving," if the "clearly erroneous" rule means anything, it is left to the trier of fact -- not this Court -- to look the witnesses in the eye and to determine which testimony is persuasive and which is not.

disfavor. (JA 2, p. JA 618; JA 5, pp. 981-82; JA 7, pp. 1556-57-; JA 11, pp. 2947, 2957, 3051, 3089; JA 12, pp. 3278, 3298-99, 3374, 3458-59, 3485-86, 3492-93; JA 13, pp. 3890-96, 3902; JA 14, pp. 4085-86; JA 15, pp. 4287, 4396-97; JA 17, pp. D 179-82, D 187-88)

Second, the proof showed, and Judge Lasker found, that a television performance of a song is of enormous economic benefit not only for the royalties it produces, but also for the records it sells and the exposure it offers.

As Judge Lasker noted (JA 2, p. JA 617):

"No less than eleven witnesses testified to the compelling desire of writers and publishers to gain television exposure for their music."

(See also, JA 11, pp. 2947, 2957, 3083-86; JA 12, pp. 3457-60, 3485-86, 3492-93; JA 17, pp. D 186-88)

Third, with rare exceptions, musical compositions are "substantially interchangeable," JA 2, p. JA 618, and there are, as one witness put it, "only three games in town" -- and CBS' is the biggest. (JA 4, pp. 429a-30; see also, JA 5, pp. 702-03; JA 10, pp. 2904-05; JA 11, pp. 2947, 3083-86) This one fact alone, as Judge Lasker noted, makes it extremely unlikely that any substantial number of copyright proprietors would either refuse to deal with CBS or

would refrain from expending whatever efforts were necessary to create "machinery" or anything else that would get them television network exposure. (JA 2, p. JA 618; JA 12, pp. 3485-86; JA 11, p. 2957; JA 12, p. 3459; JA 13, pp. 3905-07)

Fourth, the bulk of CBS' entertainment programming consists of series, which engender music performance revenues for the music publisher subsidiary of a program producer that constitute only a small fraction of the total revenues the program producer receives for selling the program to CBS. The District Court properly noted that it was a "rhetorical question" to ask whether Universal, for example, would permit its publishing subsidiary or a composer for hire to let "disinclination" prejudice the sale of a series to a television network.* (JA 2, p. JA 618)

Finally, witness after witness having any familiarity with this business -- including CBS' own former Vice President in charge of programming -- not only rebutted CBS' "disinclination" contention, but found absurd CBS' notion that "disinclination," "reluctance," "loyalty" or any other such lawyer-created slogan would pose any serious impediment to CBS if it sought to license directly.

^{*} For as Dr. Frank Stanton, for many years CBS' President, noted at his deposition, in a "per-use" world (and, hence, surely in a direct licensing world), CBS would "insist" that CBS producers come to CBS with performance rights already cleared (JA 19, pp. E 861-62). We can readily predict how a program producer would react to a little such "insistence" coming from one of but three customers for his product.

The following is representative:

Composer John Green:

"I like to think that part of my motivation is aesthetic and artistic, but I am also a fellow who earns his living by the making of music in various forms. I am also an artist who derives only secondary pleasure from thinking how great my music is when I hear it in my head.

"I like to hear it performed and I like to get paid for hearing it performed and you referred to CTN -- would I be inclined to negotiate with CTN for the performance? Well, they are one of the principal outlets in the world for the performance of music and I want my music to be performed, I want the public to hear it, I want to get paid for it and I would be totally inclined to negotiate with anybody who would like to use it." (JA 12, p. 3459)

Publisher Salvatore Chiantia:

"My primary responsibility is to get my music played. To get it exposed. And if I have to go to CBS in a direct licensing scheme, I am going to go. I am not going to sit back and say, I hope you fail. I want you to use my music and I am going to try to make it work."

(JA 11, p. 2957)

Former CBS Vice President Michael Dann:

"I am trying to establish the fact that the thrust of those who create music is to see their works performed and have the challenge of working. It would be difficult for me to believe that a composer will ever say to his representatives forget it, we don't want to do business with you."

(JA 12, p. 3278)

"... I think I can't believe in the long run that the fine musicians or the fine composers of the day wouldn't want to work with the No. 1 outlet in the history of entertainment. Here you have the giants of the world in the use of music rights and I think that if there is a difference of opinion that they eventually will want to have their stuff on."

(JA 12, p. 3374)

See also, the testimony of Albert Berman, head of the Harry Fox Agency (JA 5, pp. 926-27); Edward Cramer, president of BMI (JA 15, p. 4287); Herman Finkelstein, former general counsel of ASCAP (JA 13, pp. 3688-89); composers Aaron Copland (JA 12, pp. 3485-86) and Burton Lane (JA 6, pp. 1170-71) and publishers Alan Shulman (JA 11, p. 3089) and Arnold Broido (JA 12, pp. 3492-93).

Perhaps it was not surprising, as the District

Court noted, that the <u>only</u> witness having anything to do

with the music publishing business who said he would have

any reluctance in directly licensing CBS was CBS' employee

Walter Dean, the head of CBS' own music publisher subsidiaries.

(JA 2, p. JA 617) Surely the District Court was entitled

to find his testimony "unpersuasive."

It was on the basis of all the foregoing evidence, then, that the District Court found that direct licensing was feasible for CBS and that "disinclination" was no barrier.

Judge Lasker went further. He found (JA 2, p. JA 626):

"Even assuming, contrary to the evidence, that many publishers and writers would initially adopt a wait-and-see attitude unde a direct licensing system, it is clear on this record that any resistance they might manifest would quickly dissclve, and that CBS could easily fill its musi: needs in the meantime. The music industry is highly fragmented. There are over 3,500 publishers and many thousands of composers who are eager for exposure of their music, and well aware that their compositions are, with rare exceptions, highly interchangeable with others. In such circumstances, for direct licensing to fail CBS would have to be met with extraordinary coherent resistance by publishers and composers. There is no basis in the record for the inference that such a coherent response is likely to occur."

Surely, there is no basis whatever in the record for finding fault with these findings as "clearly erroneous."

5. The 3M Incident

In the mid-1960's, the Minnesota Mining and Manufacturing Company (better known as 3M) sought and obtained direct licenses from ASCAP's members in connection with its marketing of a tape and tape player, the M-700

project, designed to provide background music for use in small commercial establishments such as restaurants, stores and doctors' and dentists' offices. (JA 2, p. JA 618)

In a footnote to his opinion, Judge Lasker said (JA 2 p. JA 618 n. 15):

"We assume that the 3M project was not designed for the extensive play it has received in federal court."

We may add that surely the 3M project was not designed to be the basis for a 50-page addendum to CBS' brief on appeal.

In fact, the 3M incident is perhaps the best example of CBS' efforts to obtain <u>de novo</u> determinations of fact from this Court.

Thus, CBS' brief and addendum is nothing more than an almost verbatim repetition of the precise evidentiary contentions it urged to the District Court in its post-trial papers. Judge Lasker, as his opinion amply demonstrates, took note of those contentions, considered all the evidence and then determined the issues adversely to CBS.

Thus, CBS urged that the 3M incident proved that direct licensing would not be feasible for CBS. But Judge

Lasker, after considering at length and citing the evidence he deemed pertinent to the 3M incident, held (JA 2, p. JA 621):

"We conclude, that, at best, the 3M incident does not favor CBS' case. The publishers which 3M contacted were offered varying proposals and responded as they thought appropriate to their respective legitimate business interests. Four fifths of them accepted the proposal, the remainder rejected it; and some rejected it the first time around but sought to be included in 3M's second series. The evidence contains no breath of parallel conduct. Those who had fears relating to the problem of re-licensing and policing proved to be justified in their fears. Virtually all the publishers responded to 3M's unusual proposal as essentially a clean-cut business proposition; none of them refused entirely to negotiate with 3M. On such a record, no general inference of unwillingness to engage in direct dealing with 3M can be drawn. Even if it could be, it would be unwarranted to impute any such inference to the very different circumstances prevailing in the market for performance rights to music used on CBS."

There is substantial evidence -- much of it expressly set forth in the Court's opinion (see JA 2, pp. JA 618-21; see also JA 8, pp. 1963-74, 1995-96; JA 7, pp. 1530-32; JA 8, p. 1980; JA 7, p. 1421; JA 8, pp. 1989-90; JA 7, pp. 1414-15; JA 8, pp. 2004, 1982-83; JA 11, pp. 3093-95, 3137, 3058-59) -- which supports the Court's conclusions.

CBS' argument on appeal is nothing more than a claim that Judge Lasker relied on the wrong evidence.*

That is precisely the kind of argument the "clearly erroneous" rule does not permit.

6. An Alleged Obstacle - Music in the Can

Another obstacle to direct licensing now cited by CBS is the so-called "music in the can" problem. The District Court summarized CBS' contentions on this issue, as follows (JA 2, p. JA 622):

"Television programs or movies which have been filmed or taped are said to be 'in the can.' Music recorded on the soundtrack of such films or tapes is called 'music in the can.' At any given time, CBS has a large inventory of programs or feature films, much of which it will rerun over the network. CBS argues that if it cancalled its blanket license, the proprietors of compositions in the can, knowing that the music could not

^{*} CBS' only effort at showing that the 3M findings were clearly erroneous -- as opposed to asserting that CBS disagrees with the Court's findings -- is this: CBS says that only eight publishers licensed 3M's first series of tapes for the M-700 project and thus the Court clearly erred when it allegedly said "that 27 publishers agreed to deal with 3M on the first series of tapes" (CBS Br. p. 83 fn). Like so many of its contentions in this case, CBS is playing with words. The Court found, and the record clearly shows, that 3M approached 35 publishers and 27 signed contracts for the entire M-700 project. (JA 2, p. JA 619; see JA 23, pp. E 1231-99; JA 24, pp. E 1300-1528, the actual contracts which were received in evidence

practicably be removed from the soundtrack would exact premium prices for performance licenses: CBS would be forced to pay these premiums or risk infringement litigation."

The District Court found, however, that "CBS has not proven that its fears of a 'hold up' by copyright proprietors are justified," JA 2, p. JA 623.

I ain, although CBS apparently disagrees with these findings and rehearses evidence it presented below on this issue, the trial court's finding is not "clearly erroneous."* The evidence not only substantially supports the trial judge's finding, but was overwhelming against CBS.

As a threshold matter, as the trial judge noted, CBS did not offer any evidence regarding the average life span of a given inventory of programs of films to which the asserted music in the can problem could even theoretically apply. (JA 2, p. JA 624) This actually understates the facts. CBS refused to disclose, although requested to do

^{*} The court devoted some three pages of printed opinion to the discussion of this issue, and cited the principal evidence on it. Yet, CBS' brief (p. 19) simply asserts that it is "obvious" that music in the can would be a substantial barrier and proceeds as if the court made no consideration or finding on the question. Once again CBS fails to take account of the fact that the trial court found against it on a factual issue.

so, the average life span. (JA 24, p. E 1566) Thus, its "music in the can" argument was rendered entirely abstract by its failure of proof; for as the trial judge noted, if the average life of CBS' "programs in the can" is a short interval (and there is every reason to believe it is), then the inventory would be "consumed" during the inevitable interval between CBS' notice of termination of its blanket license and the date on which it commenced direct licensing. (JA 2, p. JA 624) In short, there might not even be a theoretical "in the can problem."

And even if there were, the proofs concerning practices in the music industry, and the facts concerning the nature of CBS' programming and music use, correctly persuaded the District Court that the problem is only theoretical: the premium, if any, that CBS might have to pay for music in the can would be inconsequential.

The evidence showed that there are, at present, numerous occasions when publishers could "hold up" tele-vision networks or other users, but in fact such "hold ups" are nonexistent or rare because, as Mr. Chiantia testified:

"We want the door to remain open for us and if you start holding up record companies or the people with whom you do business, you are in real trouble." (JA 10, p. 2898) See also, JA 5, pp. 967, 979-82; JA 10, pp. 2891-98; JA 11, pp. 3047-49, 3051-52; JA 12, pp. 3285-87; JA 11, pp. 3082-831

Beyond that, the District Court properly noted that most of CBS' inventory consists of motion pictures — and the music on the sound track of those motion pictures is controlled by the motion picture producers' affiliated publishing company. Thus, a motion picture producer who tried to hold out for a significant "premium" would thereby endanger future sales for network television exhibition of his principal product, motion pictures, to one of his three customers for such sales.

Finally, all the evidence pertinent to the trial court's conclusion that there would be no disinclination barrier to direct licensing (discussed at pp. 50-58, supra) also demonstrates that there would be no significant "hold up" risk on account of "music in the can." (JA 2, pp. JA 623-24)

In short, there is no music-in-the-can barrier to direct licensing.

7. Per Program Licenses and Other Alternatives to the Blanket License

The District Court found not only that there are no substantial barriers to direct licensing for CBS, but that even if there were, CBS failed to prove -- or, indeed, consider -- that there exists today a variety of means which CBS could employ to clear any "hurdles" or "obstacles" which might theoretically exist. For example, the District Court noted that an appropriate form of perprogram license could be used by CBS to overcome any rechanical difficulties in licensing the music to those CBS programs which use a good deal of music from "outside publishers," such as CBS variety shows, "Captain Kangaroo," etc. (JA 2, p. JA 625)

CBS' brief (pp. 110-19) attempts to belittle the utility of a per-program license, but its discussion suffers from the same basic defect as its papers below:

CBS simply assumes a given form of per-program license when, in fact, CBS never has negotiated or sought to negotiate a. per-program license from ASCAP on behalf of its television network. (JA 2, p. JA 625)

The trial judge also suggested a number of other techniques by which CBS might overcome any hurdles it perceived. (JA 2, p. JA 627) Observing that it was not

"for the court to propose a system for direct licensing," JA 2, p. JA 610, Judge Lasker concluded (JA 2, P. JA 627):

"There is an astonishing lack of evidence that CBS considered such possibilities, or even the feasibility of direct licensing as a general proposition before commencing suit. The fact that it did not do so does not in itself defeat its claims, but it has rendered the nature of its proof at trial largely speculative. CBS' evidence was for the most part addressed to such abstract issues as 'discinclination,' and brought out through the generous use of hypothetical questions. However, it is proof of the threat of actual anticompetitive conduct, not possible 'disinclination' which violates the antitrust laws. CBS might have obtained such proof by attempting to negotiate direct licenses. The proof which it chose to offer instead, as to the alleged fear or disinclination of copyright proprietors to engage in direct dealing, is not sufficient to establish an illegal restraint of trade. Such evidence does not prove that CBS needs, as it claims, the 'signal' of a judgment in this suit to bring about a direct licensing system; it indicates rather that CBS has the power to give a clearly audible signal itself."

To sum up in one sentence: On what CBS itself termed the "basic issue" for trial -- "whether or not we [CBS] are being deprived, realistically deprived of the opportunity of dealing directly with ASCAP members" (JA 1, p. JA 280) -- a record developed during eight weeks of trial,

and the District Court's findings supported by substantial evidence in that record, conclusively disproved CBS' contentions.

I.

ASCAP AND ITS MEMBERS DO NOT "FIX PRICES"

Our review of the evidence adduced at trial and the District Court's findings based on that evidence demonstrate that the opinion below was thorough and sound. The legal conclusions reached were equally solid.

A. The Present System Is Reasonable And Lawful.

We have shown and the District Court found that:

The Amended Final Judgment guarantees that a user such as CBS may deal with ASCAP or its members in a variety of ways; it cannot be coerced by a refusal on the part of ASCAP to grant it a license; it cannot be coerced by a rate that is discriminatory or a rate that is too high, for it may always come, under Section IX of the Amended Final Judgment, to a judge of the Southern District for determination of a reasonable fee.

Moreover, the Amended Final Judgment guarantees that a user is not "compelled" to deal with ASCAP at all -- it may always negotiate licensing arrangements directly with

those ASCAP members whose compositions it wishes to perform.

CBS tried at great length to prove that, as to it, this right is illusory. But the District Court considered all the evidence CBS offered and found to the contrary.

In K-91, Inc. v. Gershwin Publishing Corp., 372 F.2d 1 (9th Cir. 1967), cert. denied, 389 U.S. 1045 (1968), the Ninth Circuit squarely faced -- and rejected -- the charge that ASCAP, as it operates under the Amended Final Judgment, is an unlawful combination in restraint of trade or a monopoly under the Sherman Act. In that case, ASCAP members sued a Washington radio broadcaster for copyright infringement. The broadcaster asserted, as an affirmative defense, that plaintiffs, by reason of their ASCAP membership, were misusing their copyrights and otherwise were violating Sections 1 and 2 of the Sherman Act, 372 F.2d at 7.

Judge Stanley Barnes (formerly head of the Antitrust Division of the Department of Justice), writing for the Court, held that ASCAP did not violate the Sherman Act (372 F.2d at 4):

"We agree with the trial court that the activities of ASCAP do not constitute a combination in restraint of trade or a monopoly within the meaning of the Sherman Act. ASCAP is certainly a combination, but not every combination is a combination in restraint of trade or a monopoly.

"We cannot agree with the contention that the danger of unreasonable activity that might arise from ASCAP's activities makes everything that it does a violation of the antitrust laws, when those of its potential activities that might have this effect are prohibited by the decree. No contention is here made that ASCAP's actual activities do not comply with the decree. In short, we think that as a potential combination in restraint of trade, ASCAP has been 'disinfected' by the decree."

Moreover, the Court held that, because ASCAP's licensing authority was not exclusive, "and because every applicant to ASCAP has a right under the consent decree to invoke the authority" of the District Court "to fix a reasonable fee," ASCAP could not be accused of price fixing. The Court said (372 F.2d at 4):

"ASCAP cannot be accused of fixing prices because every applicant to ASCAP has a right under the consent decree to invoke the authority of the United States District Court for the Southern District of New York to fix a reasonable fee whenever the applicant believes that the price proposed by ASCAP is unreasonable, and ASCAP has the burden of proving the price reasonable. In other words, so long as ASCAP complies with the decree, it is not the price fixing authority.

"There is an additional reason why the activities disclosed by this record do not violate the antitrust laws. ASCAP's licensing authority is not exclusive. The right of the individual composer, author or publisher to make his own arrangements with prospective licensees, and the right of such prospective licensees to seek individual arrangements, are fully preserved."

We respectfully submit that the holding of the Ninth Circuit should be followed here. CBS makes no effort to distinguish that case; its sole claim is that the opinion was "analytically unsound."*

B. The District Court Correctly Held That CBS' Per Se Price-Fixing Argument Is Without Merit.

Judge Lasker wrote (JA 2, p. JA 595):

"In support of its contention that ASCAP and BMI are illegal combinations merely because they offer blanket licenses, CBS cites cases in which sellers agreed among themselves as to the prices to be charged buyers for their products. See, e.g., United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940); United States v. Trenton Potteries Co., 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927). The cases are inapposite. Unlike the plaintiffs in the cited cases, CBS does not claim that the individual members and affiliates ('sellers') of ASCAP and BMI have agreed among themselves as to the prices to be charged for the particular 'products' (compositions) offered by each of them.

^{*} CBS seeks to find solace in the stipulation of the parties in K-91 that direct licensing was impracticable as to a local radio station which broadcasts phonograph records around the clock. But if ASCAP is not even a "price fixing authority" when direct licensing is stipulated to be impracticable, it is difficult to understand how ASCAP can be converted into a "price fixing authority" when direct dealings between ASCAP's members and a user, on a competitive price basis, are practicable.

It makes the very different claim that a combination of individual sellers offering the entire pool of their products through a common sales agent at a negotiated package price is per se illegal, regardless whether the sellers are willing to sell their products on an individual basis.

"The claim fails as a matter of law.

The District Court's conclusion that CBS' claim failed "as a matter of law" was premised on its reading of Automatic Radio, Inc. v. Hazeltine Research, Inc., 339 U.S. 827 (1950) and Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969).

Both cases involved licensing arrangements for a pool of patents owned by Hazeltine. Judge Lasker, discussing both cases, wrote (JA 2, p. JA 596):

"[The Supreme Court] distinguished between the situation presented in Automatic Radio, in which the parties agreed on a package license 'as a convenient method designed by the parties to avoid determining whether each radio receiver embodied [a Hazeltine] patent,' and the situation in Zenith, where the patent holder compelled the licensee to choose between a package license conditioned on the payment of royalties on unpatented products, or no license at all." (Emphasis in original.)

Judge Lasker read those cases to mean that (JA 2, p. JA 596):

"[T]he critical difference beween an illegal licensing arrangement and a legal one is the fact of coercion or compulsion by the licensor."

He went on to hold (JA 2, p. JA 596):

"We disagree with CBS that such compulsion inheres in the present licensing system as regulated by the consent decrees and that defendants are therefore guilty of per se violations."

It is perhaps the greatest irony of this case that CBS now claims that the "central fallacy" of the court below was its reliance on Zenith v. Hazeltine -- when it was that decision which prompted the president of the CBS television network to complain that ASCAP was violating the antitrust laws and to demand a "per use" license from ASCAP on December 19, 1969 (JA 1, p. JA 31) and which thereafter became the model for the CBS complaint served on December 31, 1969.

Now, CBS argues that <u>renith</u> v. <u>Hazeltine</u> is irrelevant because it was a "single seller tying case" and because the doctrine of "insistence or compulsion" there enunciated is inapposite to CBS' price-fixing claim.

The trial court was correct, we submit, in relying on Zenith v. Hazeltine. For unless there is some inherent illegality or evil about a package or blanket license (and

Zenith held there was not), then the doctrine of Zenith -i.e., that illegality is shown only by proof of "compulsion"
-- must apply. There are two ways, conceivably, in which
a bundle or package of rights to patents or copyrights
might be licensed -- the package license may be the exclusive method by which a user can license the constituent
patents or copyrights, or it may be a nonexclusive method,
as in the case of ASCAP and users of the music in its repertory. Surely, the nonexclusive basis, which makes direct
dealings between ASCAP's members and users possible, is more
pro-competitive. And surely if there is no exclusivity and
no compulsion, in fact, then Zenith is directly in point.*

C. The Cases Relied On By CBS Are Inapposite.

CBS claims that the <u>mere existence</u> of ASCAP as a licensing agency which makes available to users a blanket license means that ASCAP's members are fixing prices and thus engaging in a per se violation of the antitrust laws. It contends that when sellers of copyrights get together only to sell the rights to <u>all</u> their works collectively, they are guilty of per se price fixing: (a) irrespective

^{*} CBS may not escape the impact of Zenith by labeling Hazeltine as a "single seller" or by dubbing the case as a "single seller tying case." Hazeltine, the corporate entity, did not create the patents in its pool -- it acquired those patents pursuant to agreement with its employees or by purchase. In this sense, ASCAP is no less a "single seller" because it acquires its rights -- on a nonexclusive basis (unlike Hazeltine) -- by virtue of agreements with its members.

of the fact that a judge of the District Court will "fix" the price for that package if the parties are unable to agree; (b) irrespective of the sellers' willingness to license each of their compositions individually; and (c) irrespective of the buyer's ability to acquire those rights individually.

No case has ever held anything of the sort. On the contrary, as we saw above, the one court, prior to the decision below, which was presented with that issue — the Ninth Circuit in K-91 — held precisely to the contrary.

CBS relies principally on two lines of cases:

first, Socony-Vacuum,* in which defendants were held guilty
of price fixing for agreeing to prop up the price of oil by
a program of purchases of distress oil. Second, CBS relies
on a series of cases, such as Plymouth Dealers' Ass'n,** in
which defendants exchanged price information and other data
about their incividual transactions.

But what have such cases to do with the facts here? Nothing, we submit.

^{*} United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

^{**} Plymouth Dealers' Ass'n v. Uniced States, 279 F.2d 128 (9th Cir. 1960). This case, we may note, was decided by the court that subsequently decided K-91.

For as we noted earlier (and as noted by the District Court, JA 2, p. JA 5951 unlike all the cases upon which CBS relies, ASCAP does not sell or offer to sell the indi idual goods that are offered by its constituent members. To the contrary, ASCAP is barred by the Amended Final Judgment from licensing individual works (except under certain limited conditions) (see pp. 25-27, supra). ASCAP sells only a product that, by definition, cannot be sold by ASCAP members. ASCAP provides a convenient service -- access to all the music in its repertory -- which nearly all users of music throughout the free world either prefer or require. Obviously, the price for that service must be negotiated by somebody. The fact that somebody (ASCAP) does that negotiating does not mean that the members of ASCAP, merely by offering that convenient service, are guilty of price fixing. And so Judge Lasker held.*

^{*} CBS displays a penchant for hypothetical analogies which ignore the critical fact that unlike CBS' steelmakers gathering in Shea Stadium, ASCAP members do not and cannot individually sell the same product that ASCAP sells. A far more useful hypothetical might be the following: if 100 musicians got together and agreed among themselves that hences the each would charge \$100 an hour for a solo recital, they might well be accused of price-fixing. But, when they get together and agree to sell their services collectively, as a symphony orchestra, at \$5,000 a concert, they may not be accused of "price-fixing." It would be an utter misuse of the language to label that agreement "price-fixing." For the collective product -- an orchestra concert -- is different from the one each could sell individually.

CBS also relies on Alden-Rochelle* and Witmark.**

Those decisions, as this Court has pointed out, have no application today and are of historical interest only in showing how they led to the 1950 Amended Final Judgment, and, particularly, to Section IX.

Both cases involved ASCAP's relations with motion picture exhibitors 30 years ago. This Court reviewed those cases and the background of the 1950 Judgment in <u>United</u>

<u>States</u> v. <u>ASCAP</u> (Shenandoah Valley Broadcasting, Inc.) 321

F.2d 117, 121 (2d Cir.), cert. denied, 377 U.S. 997 (1964):

fn cont'd

And the group's sale of its collective services as an orchestra is not rendered "price-fixing" no matter how they distribute concert proceeds among themselves: they could distribute the proceeds by paying each musician \$50 a concert, they could divide the proceeds according to need, or they could divide the proceeds on a "peruse" basis -- e.g., paying each member of the orchestra according to the number of notes his instrument is required to play in each composition performed by the orchestra. It is still not "price-fixing."

Nor would their agreement become a "price-fixing" agreement if the amount each violinist received by way of distribution from orchestra performances were a "price referent" for him in his negotiations for solo recitals.

^{*} Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888 (S.D. N.Y. 1948).

^{**} M. Witmark & Sons v. Jensen, 80 F. Supp. 843 (D. Minn. 1948), appeal dismissed mem. sub nom., M. Witmark & Sons v. Berger Amusement Co., 177 F.2d 515 (8th Cir. 1949).

"The Amended Final Judgment of March 14, 1950, considerably amplified an earlier consent judgment entered in the Government's antitrust suit against ASCAP nine years before. The 1941 judgment contained many negative injunctions with respect to licensing, but had no provision specifically addressed to television, which had not yet been developed commercially, and no provision for judicial fixing of license fees if a licensee and ASCAP were unable to agree on terms. The 1950 Judgment was designed, in part, to fill these gaps, as well as to meet the problems with respect to motion picture licensing revealed by Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888 (S.D.N.Y. 1948) and M. Witmark & Sons v. Jensen, 80 F. Supp. 843 (D. Minn. 1948)."

We may note that, in recognition that the 1950 Amended Final Judgment had met the problems he had found, Judge Leibell vacated the injunctive order he had entered in Alden-Rochelle.

Finally, CBS contends that the Solicitor General's amicus brief in the Supreme Court in the $\underline{\text{K-91}}$ case somehow helps its position. It does not.

The Solicitor General urged denial of certiorari because K-91 correctly held that ASCAP does not violate the antitrust laws. In support of that argument, he noted in his brief that for most users of music a blanket license is a necessity. But he also noted that the Amended and Judgment was specifically designed to take account of the

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Occasional user which <u>can</u> license its music needs directly (JA 1, pp. JA 127-28). Surely, he was not arguing on the one hand that ASCAP does not violate the antitrust laws <u>because</u> the right to license directly is preserved, but on the other hand that ASCAP does violate the antitrust laws when a user who actually can license directly comes along and ASCAP does nothing to interfere with its efforts to license directly.*

This case, in short, comes squarely within the conclusion of the Solicitor General that ASCAP, operating under the Amended Final Judgment, does not violate the antitrust laws.

D. Miscellany.

CBS' two remaining contentions concerning pricefixing are:

1. The mere fact that ASCAP makes available licenses to users (as it is required to do by the terms of

^{*} CBS' brief (pp. 27-28) tries to make it appear as if some new "technology" has changed matters since the date of the Solicitor General's brief. It thus tries to bring this case within a footnote in the Solicitor General's brief which had suggested that the entire licensing situation might be reviewed in the event of new technology. But it is not any change in technology which permits CBS to license its music needs directly; it is, rather, the nature of CBS, its music use and the nature of the music business as a whole.

the Amended Final Judgment) and distributes the revenues it receives to its members (as it is required to do by the terms of the Amended Final Judgment and its Articles of Association) results in "price fixing" according to CBS, because of (CBS Br. p. 37)

"The Impact of a Common-Sales Agency Reference-Point Price on Competitive Price Equilibrium Levels"

and because of (CBS Br. p. 50)

"The Impact of Publisher and Writer Resistance to Direct Dealing on Competitive Price Equilibrium Levels."

2. CBS says that the "universally recognized" point of Socony-Vacuum is (CBS Br. p. 45)

"[t]hat any agreed-upon joint activity among sellers concerning a factor that contributes to the market dynamics by which price is determined, and which under normative economic principles may thus be presumed to affect price, is unlawful per se." (Emphasis in original.)

If we understand these contentions, they reduce the selves to this simple proposition: an ASCAP member, competing on a price basis in a direct licensing world, would take into account the distributions he now receives from ASCAP for network television performances.

But so what? The fact that a seller in determining the price he will seek for his product today in a retail transaction (direct licensing) takes into account the price he obtained for his product yesterday in a wholesale transaction (an ASCAP blanket license) does not convert the wholesale transaction into a price-fixing scheme.

Moreover, the Court will recall Judge Lasker's findings that ASCAP members would compete on a price basis in a direct licensing world and that ASCAP would be unable to exercise any control over the prices negotiated in such transactions (JA 2, p. JA 630).

In short, CBS' price-fixing label is just that -- a label. It has no application to this case.

The words of Judge Medina, in another case where the plaintiff strung together a series of "general statements about price fixing" using the very cases now cited by CBS, apply here:

"The law is full of perplexities which mystify lawyers and laymen alike. Much of the difficulty is can ed by endless and at times futile discussion of decisions rendered in earlier cases, with liberal quotations from opinions intended to apply to particular situations. This in turn leads to discussion of other cases and further quotations and the making of distinctions and explanations. Much of the confusion, especially in the field of antitrust law, is due to the

fact that the breadth and scope of the Sherman Act are so general and so beneficient that lawyers and even judges often fail to heed repeated admonitions that each case must necessarily stand on its own legs, and that the conclusions reached in each depend largely upon the peculiar characteristics of the particular industry involved. That is why discussion of 'loose-knit' 'clcse-knit', 'vertical' and 'horizontal' combinations, wholesale and retail 'merchandising', and 'good intentions', the 'elimination of trade abuses', 'hardship' and so on is mere mumbo jumbo which, far from leading to a solution of the questions of law involved, adds to the general confusion. Probably this is just another manifestation of how human nature works. Those of ripe experience in any craft rejoice in every opportunity to surround their skills with an air of mystery by using an esoteric terminology; and lawyers who are specialists in patent, admiralty and antitrust cases are no exception to the general run of mankind." States v. Morgan, 118 F. Supp. 621, 688 (S.D.N.Y. 1953).

There is one final point to be made about the CBS price-fixing theory. If it had any merit at all, the party guilty of price-fixing in this case would be CBS.

What, after all, is the CBS television network but a common selling and buying agency for 200 local television stations, which determines (a) the price these individual stations would otherwise pay for programs if they dealt directly with program suppliers and (b) the amount these individual stations would otherwise receive by way of advertising revenues if they dealt directly with advertisers. But,

as to CBS, the common agency which eliminates direct dealings between program suppliers and advertisers and the 200 stations in its network, there is no Amended Final Judgment and there is no judge standing by to set reasonable prices when CBS overreaches in its dealings with program suppliers or advertisers.*

II.

THE FINDINGS OF THE DISTRICT COURT THAT
CBS IS NOT "COMPELLED" TO TAKE AN ASCAP
BLANKET LICENSE AND THAT DIRECT LICENSING
IS FEASIBLE FOR CBS ARE NOT "CLEARLY
ERRONEOUS"

We have already demonstrated that the findings of the District Court on the central fact issues in this case were anything but "clearly erroneous" under the well-established standards of that rule.

^{*} CBS' price-fixing theory would mean that this Court wrongly decided the Kemper Insurance case. In that case, an advertiser claimed that the ABC television network was guilty of "tying" because it sold advertising time for a package of stations. This Court held that plaintiff's claim failed because plaintiff did not prove "compulsion" to take the entire package. On CBS' theory here, this Court should have held the network guilty of price-fixing per se for setting the package price for advertising time on its affiliated stations and not bothered with "compulsion."

American Mfrs. Ins. Co. v. American Broadcasting-Paramount Theatres Inc., 446 F.2d 1131 (2d Cir. 1971), cert. denied, 404 U.S. 1063 (1972).

All that remains, therefore, is to deal briefly with some of the specific challenges CBS offers to the trial court's findings.

So:

"CBS apparently finds it curious (CBS Br. p. 94) that the District Court, as to certain issues, found Mr. Sipes' testimony "unimpressive," but on the other hand, credited, and relied upon, Mr. Sipes' concession that the requisite direct licensing machinery would "spring up" under either of CBS' two proposed forms of relief.

We fail to see what CBS finds curious. Judge
Lasker is hardly the first trier of fact to find unpersuasive a witness' self-serving statements, but give credence
to that witness' admission against interest.

CBS complains that the District Ccurt's opinion did not recite this or that item or items of evidence adduced by CBS on a particular issue (e.g., CBS Br. pp. 21-22, 52, 67, fn, 85-86, 88-90). But there is no obligation on a trial court to list every item of evidence found not persuasive. Rather, this Court has held:

"... we state the rule to be, especially in this case where the testimonial evidence is conflicting and the trial judge saw and heard the witnesses as they gave their testimony, that a finding of fact

by a District Judge in a non-jury case must stand if there is substantial evidence to support it; and it must be assumed that conflicting testimony was rejected and that documents or parts thereof depending on the veracity of. the witnesses giving such conflicting testimony were found to be unreliable, even if the trial judge does not make an endless series of detailed statements to the effect that he does not credit. the testimony or part of the testimony of each witness." Ruby v. American Airlines, Inc., 329 F.2d 11, 14 (2d Cir. 1964), vacated as moot, 381 U.S. 277 (1965).

"CBS takes the jargon and code words it used below, alters them a little, and tries to make it appear as if the trial court's findings were wrong because the court did not truly understand CBS' contentions. Thus, "disinclination" has now become "aversion," and "machinery" has now become "facilities" (CBS Br. pp. 80-61). And the trial judge erred, CBS says, because he "compartmentalized" (CBS Br. p. 80) the various asserted barriers to direct licensing. According to CBS, the trial judge failed to "connect in any meaningful way" copyright proprietors' alleged "aversion" to direct licensing with the asserted fact that, for direct licensing to work, they would have to spend their good money and efforts in order to create the requisite "facilities" for direct licensing (CBS Br. pp. 80-82).

This argument totally misrepresents the opinion below. For it was the <u>CBS witnesses</u> -- not the District Court -- who "compartmentalized" matters when they claimed that there was some separate and distinct "machinery" problem. In fact, it was cross-examination of those witnesses by defendants that showed that all their arguments about machinery in fact reduced themselves to, and hinged upon, "disinclination." (JA 3, pp. 201-02; JA 4, pp. 365-66, 500, 513-14; JA 5, pp. 686-88, 695-99)

And the trial court plainly recognized that CBS' claim on "disinclination," as ultimately framed, was closely related to its claim concerning machinery (JA 2, p. JA 612):

"As CBS post-trial papers recognize, even questions such as mechanical feasibility hinge almost exclusively on the willingness or unwillingness of the defendants to smooth CBS' course or obstruct it, as the case may be."

"CBS' case rests primarily on its claim that copyright proprietors would refuse to deal directly if CBS asked, or at least make it such an arduous and expensive proposition that CBS would be forced to resume the blanket arrangement." (Emphasis added.)

The District Court's opinion clearly understood CBS' contention that there existed a totality of barriers

so great as to create too high a risk of a substantial competitive disadvantage if CBS tried direct licensing.

Judge Lasker said (JA 2. p. JA 601):

"CBS claims that it established at trial that the defendants have structured the market in such a way as to lock it into a blanket licensing arrangement and to make any attempt to license its music needs directly so prohibitively risky as to preclude it from even trying."

And in the very next paragraphs of its opinion which follow this quotation, the court went on to describe the "barriers" cited by CBS and the asserted "connections" among those barriers which CBS now says the court "elided."

¶ CBS says the trial judge misconstrued its "disinclination" contention as a boycott claim -- whereas,
according to CBS, it never claimed that, for "disinclination" to be effective, copyright proprietors would actually
have to refuse to deal with CBS, or take any affirmative
action at all to "thwart" a direct licensing attempt (CBS
Br. p. 82).

As we noted earlier, CBS did, in fact, repeatedly shout "boycott" below (see p. 50, supra). But beyond that, the trial court understood CBS' claim in precisely the way CBS now phrases it: CBS, the trial judge said, claims that, "because the blanket license system insulates copyright

proprietors from price competition among themselves, they have no incentive to create the machinery...." JA 2, p. JA 602 (Emphasis added.)

The trial court rejected CBS' contentions as contrary to the credible proof. The court found that "there is impressive proof that copyright proprietors would wait at CBS' door if it announced plans to drop its blanket license," JA 2, p. JA 626.

According to CBS, its real claim, which Judge Lasker allegedly failed to understand, is that copyright proprietors would "forebear" from spending their own money or exerting the requisite efforts to make direct licensing work. And, according to CBS, "it would be abundantly clear to everyone in this industry that they would not have to refrain [from direct licensing] for very long" in order to impose upon CBS a crippling "competitive disadvantage."

(CBS Br. p. 82).

This kind of rehearsal of abstract arguments based upon allegedly "obvious" propositions perhaps best typifies the kind of challenge CBS makes to the trial court's findings.

What is CBS' record citation for its statement about what "would be abundantly clear to everyone in this

industry"? (CBS Br. p. 82) The opinion of its theoretical
economist -- who had never so much as spoken to anyone in
the industry! (JA 8, pp. 1770-71; JA 16, p. 4853)

The evidence which controverted that opinion included the following:

Salvatore Chiantia, the head of Universal's publishing subsidiary, who has been in the business nearly all his life, said:

"My primary responsibility is to get my usic played. To get it exposed. And if I have to go to CBS in a direct licensing scheme, I'm going to go. I am not going to sit back and say I hope you fail. I want you to use my music and I am going to try to make it work." (JA 11, p. 2957; emphasis added.)

And Michael Dann, for many years CBS' programming chief, testified:

"Under the present programming schedule of CBS, I car think of nothing I could live with easier as a program bureaucrat than losing this for the moment, these rights for the moment.

"I do not believe that the role of music is such in network broadcasting that any appreciable loss of certain kinds of music could threaten its existence, any more than a loss of a star in a program. The program goes or, it would replace it....

- "Q Would it threaten the competitive effectiveness of CTN's programs?
- "A ... I do not think that it would be a factor in CBS' chance to be highly competitive in the market place."

 (JA 12, pp. 3310-13, 3374; emphasis added.)

It cannot seriously be contended that a trial judge should be faulted for rejecting the abstract opinion of a theoretical economist in favor of such testimony.

¶ Finally, CBS adduces a collection of excerpts from deposition and trial testimony, selective quotation of documents, and lengthy discussions of irrelevant ancient history. We must caution this Court that the full record does not support CBS.

In view of the manner in which Judge Lasker dealt with the issues in this case, we shall not respond to each of CBS' misstatements; to do so would unduly burden this Court. Judge Lasker, after "a studious review of the record," JA 2, p. JA 610, commented upon CBS' practice of "snippet[ing]" deposition and trial testimony out of context.* JA 2, p. JA 614. Let us cite only a few examples of CBS' misrepresentations of the record:

^{*} What CBS calls "admissions" on the part of the defendants are, in truth, a litany of such snippets.

-- CBS cites the "Warner Bros. Incident" of 1937; according to CBS, the Warner publishing company "attempted to split off from ASCAP and commence the licensing of broadcasters on its own," and this attempt evoked a "'violent' reactio[n] of writers." Across four decades, says CBS, this incident holds a "lesson" for a CBS "bypass" today. (CBS Add. A at 11)

CBS fails to advise the Court, however, that the evidence showed that, when Warner left ASCAP, it was the radio broadcasters who refused to deal with Warner, thus losing for Warner's writers a major source of revenue. Consequently, many writers were upset and left Warner for other publishers. After nine months of boycott, by the radio broadcasters, Warner returned to ASCAP. (JA 13, pp. 3706-07; JA 19, p. D 648)

-- CBS excises quotes from the deposition of Jerry Vogel, says that he is the proprietor of "one of the most important catalogs in the industry," and cites his testimony as an example of ASCAP members' "admissions" on CBS' "reluctance" or "disinclination" claim (CBS Add. A at 3).

Mr. Vogel owns Jerry Vogel Music, Inc., an ASCAP publisher of some importance, but hardly a leading publisher.

Mr. Vogel is a man in his late 70's, and the scope of his activities is limited -- he runs a one-man operation in the area of acquiring and exploiting the renewal rights to copyrighted works. Which prompts Mr. Vogel to answer his telephone: "Jerry Vogel Music -- the old songs are the best songs." Is it possible on the basis of what this one publisher said at his deposition -- contrary to the testimony of leading publishers -- to reach a conclusion as to how ASCAP's publishers, generally, would conduct their business if CBS sought direct licenses from them?

-- CBS repeatedly quotes excerpts from the deposition of Leon Brettler and claims that these excerpts are admissions of defendants' antipathy to direct licensing. But these repeated quotations are no answer to the finding of fact made by the District Court that "the snippets of testimony [from Mr. Brettler's deposition] on which CBS relies are replete with the Darwinian imagery of cutthroat competition among hungry publishers and writers seeking network exposure," JA 2, p. JA 614, and that, when read in its entirety, the Brettler deposition takes on "an entirely different hue," JA 2, p. JA 615.

As to the latter point, Judge Lasker noted that (JA 2, p. JA 615): "Brettler testified that 'there is no question of the fact that we would negotiate something' if a producer requested performance rights (Dep. 184-85) and that 'hordes' of other publishers would do the same. (Dep. 304-05)."

CBS is, to be sure, unhappy about these findings of fact by the District Court, but Rule 52(a) says nothing about an appellant's unhappiness as a basis for overcurning such findings.

III.

ASCAP AND ITS MEMBERS ARE NOT GUILTY OF MONOPOLIZATION UNDER THE SHERMAN ACT

The District Court fully dealt with CBS' monopolization arguments (JA 2, pp. JA 629-30) and, indeed, gave the complete answer to all of CBS' arguments on appeal:

"The relevant market is the market for p formance rights to compositions suitable for television network use (JA 2, p. JA 629);

"... the relevant market includes all sellers of performance licenses for network use, including ASCAP and BMI, as sellers of blanket licenses, and individual copyright proprietors, as sellers of 'direct' licenses (JA 2, p. JA 630)

*

"CBS has not established that ASCAP and BMI have power to control the prices in the market for performance licenses. We have found that copyright proprietors would deal readily on a price basis; certainly the record does not establish that ASCAP and BMI could effectively control the prices at which such transactions take place. Indeed, as noted earlier, the power of ASCAP and BMI control the price even of their own blanket or per-program licens s is sharply curtailed under the decrees (JA 2, p. JA 630);

"Finally, there is no substantial evidence that ASCAP and BMI have attempted to monopolize the market for performance rights for network use. Although at present they are the sole suppliers of CBS' music needs, such a state of affairs has resulted not from any violation of the antitrust laws but because CBS has, since the advent of television, found it convenient to secure a blanket license which, by definition, can be practicably obtained only through a collective licensing agent. The fact that CBS now wishes to change its long standing business practices does not, without more, con ore defendants into monopolists." (A 2, p. JA 630)

Let us add a few words of our own. Unlike unlawful monopolies, ASCAP has no power to, and does not, boycott or exclude either members or compositions. Compare, e.g., Silver v. New York Stock Exchange, 373 U.S. 341 (1963);

Associated Press v. United States, 326 U.S. 1 (1945). It has no power to control the supply of any products and thereby exact a price. Compare, United States v. Aluminum

Co. of America, 148 F.2d 416, 426 (2d Cir. 1945). And it

has no power to discriminate, either in price or in any other fashion, among users similarly situated. Compare, e.g., United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 340-41 (D. Mass. 1953), aff'd, 347 U.S. 521 (1954).

In sum, it is difficult, we suggest, to label as an unlawful "monopolist" an organization which (a) permits everyone who so wishes to enter it; (b) permits everyone who so wishes to leave; (c) has no power to refuse a license; (d) has no power to set a price; (e) has no power to discriminate among users or members; and (f) has no power to prevent its members from dealing with users directly.

CONCLUSION

We respectfully submit the order below should be affirmed.

Respectfully submitted,

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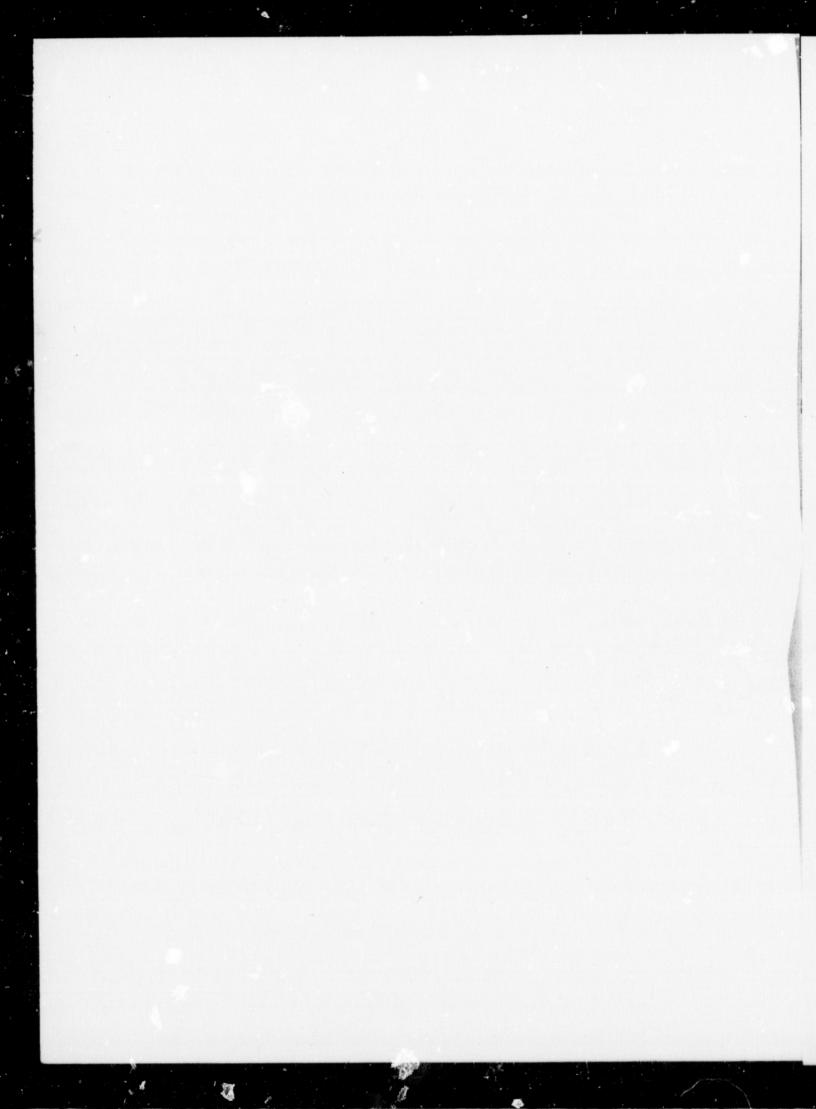
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AFFIDAVIT

STATE OF NEW YORK : ss.:)

COUNTY OF NEW YORK

FRED HEATHER, being sworn, states: deponent is not a party to the action, is over 18 years of age and resides at 196 North Richmond Avenue, Massapequa, New York 11758. That on the 7th day of June, 1976, deponent served the within Brief upon

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the addresses designated by said attorneys for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Sworn to before me this

7th day of June, 1976.

Public Notary

EDWARD H. SUTTON Notary Public State of New York No. 03-3907350 Qualified in Bronx County Commission Expires March 30, 1977